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F. V. HALVERSTADT ET AL., APPELLANTS, V. FRED BERGER, APPELLEE.

FILED OCTOBER 5, 1904. No. 13,618.

Liquor License: APPEAL. A final order by a district court rendered upon appeal from an order of a village board, granting or refusing a license to sell intoxicating liquors, is not reviewable upon appeal by this court.

APPEAL from the district court for Dawson county: CHARLES L. GUTTERSON, JUDGE. *Dismissed.*

H. D. Rhea, for appellants.

Warrington & Stewart, contra.

AMES, C.

A village board overruled a remonstrance to a petition for a license to sell intoxicating liquors and granted the license. The remonstrators appealed to the district court, by whom the action of the board was approved and affirmed, and from this order an appeal was taken to this court, where it is objected that the proceeding is not reviewable by appeal. The question has never been decided here, but it was mentioned and a doubt expressed about it in *Livingston v. Corey,* 33 Neb. 366. There is no especial provision by statute for the review of such orders in this court, but by section 582 of the code it is enacted: "A judgment rendered or final order made by the district court, may be reversed, vacated or modified by the supreme court, for errors appearing on the record." It is quite clear that such a proceeding is not a "civil case" within the meaning of section 24, article I of the constitution, and if the question were deemed an open one, the writer would not hesitate to hold that a final order in such a proceeding is not reviewable in this court at all. The granting or refusal of a license to sell liquors is the exercise of a purely police regulation, involving no personal

or property right, and largely discretionary with the licensing authority; and the district judge, in deciding an appeal in such cases, performs an administrative rather than a judicial function. If the license is refused the applicant, in contemplation of law, loses nothing, and if it is granted he acquires a brief privilege, which will expire before the proceeding can be presented to this court for review, so that in any event this court can have before it nothing but a mooted question of no personal or pecuniary importance to the parties. But, however this may be, analogy with the decision of this court in *Nebraska Wesleyan University v. Craig's Estate,* 54 Neb. 173, is conclusive to the effect that the order complained of is not reviewable here by appeal, and it is therefore recommended that the appeal in this case be dismissed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the appeal in this case be

DISMISSED.

CHARLES C. PINE V. NETTIE S. PINE.

FILED OCTOBER 5, 1904. No. 13,676.

Divorce: JURISDICTION. When the plaintiff in a divorce suit has resided in this state the full statutory period and the defendant has appeared in the cause, the court has jurisdiction over the parties, and the right to dispose of all the issues between them upon their merits and according to equity, even if, in order to do so, it is necessary to grant a divorce to a nonresident defendant upon a cross-petition.

ERROR to the district court for Dodge county. CONRAD HOLLENBECK, JUDGE. *Reversed with directions.*

George L. Loomis, for plaintiff in error.

F. W. Vaughan, contra.

AMES, C.

This is an action for a divorce begun by the wife in the district court for Dodge county. It is not disputed that she had been a *bona fide* resident of the state for the period required by statute, or that the court had jurisdiction of her petition. Due service by publication was had upon the husband, who was a nonresident of the state. He entered a personal appearance and filed an answer and cross-petition denying the material allegations of the petition, except the marriage, and praying a divorce in his own behalf because of offenses alleged to have been committed by the plaintiff. The court found the petition of the plaintiff to be false, and dismissed her action, and found the accusations of the defendant to be true, but dismissed this cross-petition also upon the sole ground that, because of his nonresidence, the court was without jurisdiction of it. The defendant prosecutes error.

The contention of the defendant in error is that the husband, in this instance, is within the literal prohibition of section 8, chapter 25 of the Compiled Statutes, 1903 (Annotated Statutes, 5330), which reads: "No divorce shall be granted unless the complainant shall have resided in this state for six months immediately preceding the time of filing the complaint, or unless the marriage was solemnized in this state, and the applicant shall have resided therein from the time of the marriage to the time of filing the complaint." The question thus raised has never been explicitly decided in this state, but it has been held that a divorce may be granted to a defendant upon cross-petition, and such seems to have been hitherto the general understanding of the courts and practitioners in this state. *Berdolt v. Berdolt,* 56 Neb. 792. And in *Atkins v. Atkins,* 13 Neb. 271, a decree of divorce in favor of a nonresident cross-petitioner was affirmed, although the precise point now suggested does not appear to have been presented by counsel and is not mentioned in the opinion.

Section 11 of chapter 25, Compiled Statutes, 1903 (An

notated Statutes, 5334), enacts that "suits to annul or affirm a marriage, or for a divorce, shall be conducted in the same manner as other suits in courts of equity"; and in Michigan, whence the chapter seems to have been derived, it was held in *Clutton v. Clutton,* 108 Mich. 267, 31 L. R. A. 160, that a nonresident cross-petitioner may, in a proper case, be granted the relief prayed. There is in force a similar statute in Illinois, and the Michigan court quotes with approval the following language from a decision, *Sterl v. Sterl,* 2 Ill. App. 223, which we also adopt:

"It is insisted by the appellee, that under the provisions of the above section of the statute the appellant had no right to file her cross-bill, praying amongst other things, for a divorce, for the reason that she was not a resident of this state, and that fact appearing on the face of her cross-bill, he could avail himself of such fact of nonresidence by way of demurrer. * * * It is a familiar principle of law that a court of equity having acquired jurisdiction of the parties and of the subject matter of the suit will retain and exercise such jurisdiction, until the equities of all the parties are meted out to them. In this case the jurisdiction of the court is invoked by the appellee, he having, as he had a legal right to do, filed his bill against appellant praying relief and summoning the appellant into the court. When she is thus brought in, and having responded to the claims of the appellee by answering his bill of complaint, being, as it were, then forced into the court, submits herself to its jurisdiction, and asks the court to grant to her certain equitable rights, to which she claims to be entitled, then it is that the appellee challenges the jurisdiction of the court to grant to her any equitable rights, but continues to clamor for his. This position is unconscionable and indefensible upon the principles of equity. But we are told, and it is urged by the appellee, that by reason of the arbitrary provisions of the statute, there is no escape from this dilemma, and that, as a consequence, the appellant is in the court for the purpose of receiving its mandate, and yielding

obedience to its orders, but without any equitable rights which the appellee is bound to respect, for the reason, as he claims, that she resided in New York, and not in Illinois, and notwithstanding she is dragged into the court, at the suit of the appellee, and, as may be presumed, against her will. We think that by the plainest principles of equity the appellee is, under such circumstances, precluded from questioning the jurisdiction of a court which he has himself invoked; and that the court having acquired jurisdiction of the subject matter, and the parties to the suit at the instance and by the prayer of the appellee, he cannot be heard to question the jurisdiction of the court to hear, consider and determine all the equities of the parties to the end that complete justice may be done to all in the same case."

We also adopt the opinion of the supreme court of Michigan that it follows that it is a reasonable construction of our statute that, where the plaintiff in a divorce suit has resided in this state the full statutory period, and the defendant has appeared in the cause, the court has jurisdiction over the parties, and the right to dispose of all the issues between them upon their merits and according to equity, even if in order to do so it is necessary to grant a divorce to a nonresident defendant upon a cross-petition.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded, with instructions to enter a decree upon the cross-petition as therein prayed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded, with instructions to enter a decree upon the cross-petition as therein prayed.

JUDGMENT ACCORDINGLY.

CHARLES F. HORNER v. GEORGE B. HUGHBANKS.

FILED OCTOBER 5, 1904. No. 13,603.

Evidence examined, and *held* sufficient to sustain the judgment of the trial court.

ERROR to the district court for Dawson county: CHARLES L. GUTTERSON, JUDGE. *Affirmed.*

Warrington & Stewart, for plaintiff in error.

J. H. Linderman and *Geo. C. Gillan, contra.*

OLDHAM, C.

This was a suit by plaintiff in the court below to recover the purchase price of corn alleged to have been sold and delivered to the defendant for the agreed price of 23 cents a bushel. The issues were tried to a jury in the court below, and a verdict returned for plaintiff as prayed in his petition, and defendant brings error to this court. The only alleged errors called to our attention in defendant's brief are that the evidence is not sufficient to sustain the verdict, and that the instructions of the trial court were not warranted by the testimony. As there is no complaint about any of the instructions misstating the law, we shall treat the two assignments of error together, and proceed to an examination of the testimony contained in the bill of exceptions.

It appears without dispute that plaintiff in the court below was a tenant on a farm situated in Dawson county, which defendant purchased in the spring of 1903, and before the expiration of plaintiff's lease; the defendant purchased the unexpired lease of the farm from plaintiff, and arranged to take possession from the 1st to the 10th of April, of that year; that this arrangement and agreement was entered into in the month of March, and that there was considerable standing corn on the farm at this time, which the plaintiff was proceeding to gather before

delivering possession of the place; that certain corn was standing on a wheat field of about 50 acres; that defendant suggested to plaintiff that it would injure the wheat to gather the corn at this time as the ground was muddy, and suggested to him that he and his tenants could possibly use 400 to 500 bushels of the corn standing in the wheat field; and it was agreed between the parties that either defendant or his tenant would go on the land and husk the corn from two rows, and measure that amount, and estimate the remainder of the corn by multiplying the number of rows by the average yield of the two rows measured; and for this corn defendant was to pay 23 cents a bushel. About the price and the manner of estimating the quantity of growing corn there is no dispute between the parties; nor is there any dispute that defendant sent his tenants to measure the corn growing in the manner agreed upon; and there was by this agreed estimate 572 bushels of corn on the wheat field. It is also in evidence that defendant took possession of the premises on the 9th of April, and that all this corn was left on the wheat field by the plaintiff. It is also undisputed that defendant gathered all this corn after taking possession of the premises; but defendant contends that while he said he could use 400 or 500 bushels of corn, yet that he only agreed to take 100 bushels at the price and under the estimate agreed upon, and that when he gathered the corn he separated the amount taken from the wheat field into two bins, reserving all in excess of 100 bushels for the plaintiff, and that he had tendered plaintiff $23 for 100 bushels of corn which he had kept for himself. On the contrary, the plaintiff and his brother testify that the defendant agreed to take all the corn in the wheat field on the agreed terms before set out. In this condition of the record we think there was much competent testimony to sustain the verdict of the jury, and we therefore recommend that the judgment of the trial court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NATIONAL BANK OF COMMERCE, APPELLEE, V. EDITH R. CHAMBERLAIN, APPELLANT.

FILED OCTOBER 5, 1904. No. 13,608.

1. **Review.** Issues in the district court examined, and *held* reviewable, on appeal, by this court.
2. **Homestead rights** cannot be divested by the act of the husband alone, but subsist in the wife after she has been abandoned by her husband.
3. **Homestead:** ABANDONMENT. Both an intention to abandon and an actual abandonment must concur in order to show an abandonment of the homestead.
4. ———: ALIENATION. A homestead is not a subject of fraudulent alienation.

APPEAL from the district court for Johnson county: JOHN S. STULL, JUDGE. *Reversed with directions.*

Halleck F. Rose, W. B. Comstock, and *Ed M. Tracy,* for appellant.

S. P. Davidson, contra.

OLDHAM, C.

On the 2d day of September, 1902, the National Bank of Commerce of Kansas City, Missouri, brought a suit at law against Charles M. Chamberlain on 5 promissory notes in the district court for Johnson county, Nebraska. On the 3d day of September it caused an attachment to issue in aid of its suit at law, and at the same time levied on a large amount of property alleged to have been owned by Charles M. Chamberlain, who had previously absconded and fled from the county and state. Among other prop-

erty, the attachment was levied upon an irregularly described piece of land containing about 60 acres, on which Edith R. Chamberlain, the wife, and three minor children of Charles M. Chamberlain were residing, and on which they had continuously resided for a long time before the levy of the attachment. William W. Wheatley, as treasurer of Johnson county, also had an attachment levied on all this property in aid of a judgment which he had procured against Charles M. Chamberlain and others, as sureties, on the depository bond of the Chamberlain Banking House. The two causes of action were consolidated by agreement and tried together. The treasurer of the county was defeated on the merits of his attachment, and is only here asking for relief from a portion of the costs taxed against him. The issues on costs between the county treasurer and other parties to the suit will be subsequently determined on a motion to retax costs and need not be further considered. After the levy of the attachment on the property claimed as a homestead, Edith R. Chamberlain presented an application to intervene, in which she represented to the court that the attachments were wrongfully levied upon her homestead; that she is the wife of Charles M. Chamberlain, and that she, with her three minor children, reside upon and occupy the premises as a homestead; that the husband is absent from the county and that she has a right to appear for herself and minor children; that the sheriff of Johnson county has levied upon and holds the homestead (describing it), and threatens to sell said homestead under the levy so made; that on the date of making the levy she informed the sheriff that said premises constituted her homestead, and that she subsequently served written notice on the sheriff that she claimed said property as her homestead; that the action is not based upon any debt secured by mechanics' liens, laborers' liens, or vendors' liens, nor upon any debt secured by a mortgage on the said land; that the premises are incumbered by a mortgage of $1,000 and by the taxes for the year 1902, and that their total value, exclusive of

incumbrances, does not exceed $2,000; that she and her husband are residents and citizens of the state of Nebraska and Johnson county; that the levy of the attachment puts her title to her homestead in question and casts a cloud thereon. The cross-petition concludes with the following prayer:

"Wherefore, intervener prays that the said levy be declared not a lien upon the said premises; that the cloud thereby cast be removed from the said premises; that the plaintiff be perpetually enjoined from asserting or claiming any lien upon the said premises by virtue of judgment, or the said order of attachment, or the levy thereunder; that William H. Cummings, sheriff of Johnson county, Nebraska, be perpetually enjoined from selling the said premises by reason of the said order of attachment or the levy thereunder; that title to said premises may be quieted in and declared intervener's homestead, and for such other and further relief as may be just and equitable."

The bank filed an answer to this cross-petition, in which it alleged, in substance, that the amount of the property claimed as a homestead was more than the head of a family is entitled to under the law, and it is worth more than $3,000; that the indebtedness upon which the judgment sued on was obtained was incurred by fraud practiced upon the plaintiff by defendant, Charles M. Chamberlain, and that the defendant has absconded and is a fugitive from justice at this time, and neither he nor this intervener is entitled to any homestead exemption for that reason. On the issues thus joined there was a trial on the intervener's petition to the court, who found the issues all in favor of the plaintiff bank, and directed a sale of the property in controversy under the levy. From this order and judgment, Edith R. Chamberlain prosecuted her appeal to this court.

The first question urged on behalf of the plaintiff bank is that the intervening petition of Edith R. Chamberlain was treated by the court below merely as a motion to dissolve the attachment, and that, as the attachment pro-

ceeding was a purely legal action, the judgment of the court in overruling a motion to dissolve the attachment can only be reviewed upon error and not by appeal. An inspection, however, of the intervening petition shows clearly that the intervener asked only for such relief as a court of equity alone could grant. While the court might have refused to permit the intervention and required the intervener to have brought an independent action for the relief sought, yet he did otherwise, without any objection from the plaintiff bank, and when the petition was filed, the bank answered without objecting to the manner in which it was brought into court, so that the court obtained full jurisdiction both of the persons of the litigants and the subject matter of the controversy; and it makes no difference what he may have styled the proceedings in his journal entry, it was and is a suit in equity to remove the cloud from the homestead of the intervener, and as such the final order of the district court, denying the relief prayed for, is reviewable by this court on appeal.

The court found, without a scintilla of proof or any allegation in the answer of the bank to support the finding, that the mortgage on the homestead was fraudulently executed, without consideration, and for the purpose of defeating the creditors of Charles M. Chamberlain. This finding, after an examination of the record, we are compelled to set aside as unsupported either by the pleadings or proof, and as a matter not properly in issue.

The court also found, without testimony other than the admission of the intervener, that after her husband absconded she had tried to effect a sale of her homestead for $2,000, and that she had abandoned the homestead. In view of the fact that she and her minor children were at that time, and still are, residing on the homestead, this finding flies in the face of both the homestead law of our state and the testimony contained in the bill of exceptions, and must also be set aside as wholly unsupported by the evidence.

On the question of the value of the property claimed as

a homestead, there was some difference in the opinion of the witnesses. Some placed the value at $3,000, others at at $3,500, and still others as high as $4,000. But as the question of a surplus can be determined on the proceedings authorized by statute after the judgment we shall presently direct, it is not necessary now to determine what the actual value of the lands claimed is.

There are certain questions connected with homestead rights that have been so often determined by this court that they should now be the common knowledge of every member of the bar in this state. One of these is that homestead rights cannot be divested by the act of the husband alone, but subsist in the wife after she has been abandoned by her husband. The principle has been so often announced from this court that citations in its support are unnecessary. Another principle is that both an intention to abandon and an actual abandonment must concur in order to show the abandonment of the homestead, and still another is that the homestead is not a subject of fraudulent alienation. Applying these three principles to the testimony in the record, we conclude that the fact that Charles M. Chamberlain had absconded and departed from the state did not, and could not, divest his wife and minor children of the homestead which they then occupied; that, in order to show an abandonment of the homestead, it was necessary not only to prove that the intervener intended to, but actually had, abandoned it; and further, that even if intervener had sold her homestead, she had a right to do this under the law, and her act in doing so would not have been in fraud of any of the rights of creditors, either of her husband or herself.

Lastly, even if there be a surplus in this homestead, such fact would not authorize its levy and sale on execution or attachment after notice of the homestead character of the premises had been duly served upon the sheriff. But the proceeding to finally reach the surplus must be had in the manner directed in sections 5-13, chapter 36, Compiled Statutes, 1903 (Annotated Statutes, 6204-6212).

There is some complaint in the brief of plaintiff bank as to the sufficiency of the bill of exceptions, but these matters have already been settled by the court proper and need not be further considered.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to the court below to enter a judgment as prayed for in plaintiff's petition for a homestead of the value of $2,000 above liens and incumbrances in the lands described in her petition.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to the court below to enter a judgment in favor of the intervener for a homestead of the value of $2,000 above liens and incumbrances in the lands described in her petition, and for such other proceedings as may be required, in conformity to this opinion.

JUDGMENT ACCORDINGLY.

IDA FAULKNER, APPELLEE, V. BENJAMIN E. POWELL ET AL., APPELLANTS.

FILED OCTOBER 5, 1904. No. 13,622.

Evidence examined, and *held* sufficient to sustain the judgment of the trial court.

APPEAL from the district court for Dawson county: CHARLES L. GUTTERSON, JUDGE. *Affirmed.*

H. D. Rhea, for appellants.

Warrington & Stewart, contra.

OLDHAM, C.

This was an action instituted in the district court for Dawson county by the appellee, as plaintiff, against appellant, as defendant, for the purpose of having a certain deed to real estate situated in said county, given by the appellee and her husband to the appellant, declared to be a mortgage and praying that the same be canceled for the reason that it had been fully paid and satisfied. There was judgment for the plaintiff below as prayed in her petition, and defendant brings the cause to this court on appeal.

To arrive at a conclusion, independent of the judgment of the trial court, we have carefully examined the testimony contained in the record, which is not at all lengthy, but four witnesses having been produced at the trial in the court below. About certain facts connected with the controversy there is no dispute. These are that the plaintiff and her husband have resided for a number of years on the land in controversy, and that, prior to the execution of the deed to defendant, the land was owned by plaintiff. It is also without dispute that plaintiff and her husband had executed a mortgage on the premises for the purpose of securing an indebtedness of plaintiff's husband to the McCormick Harvesting Machine Company for the sum of about $450, and before the making of the deed in controversy it is also undisputed that the agent of the harvester company called upon plaintiff's husband for a settlement of this debt, and that plaintiff's husband first offered to make him a deed for the premises without foreclosure in satisfaction of the debt; that during these negotiations plaintiff and her husband were represented by one Hammond, who is since deceased, and was at the time a member of the bar and a real estate agent; that Hammond suggested that the property could be sold for $100, and that the agent of the harvester company offered to take $100, and satisfy the mortgage in full. Plaintiff herself was not present at this conversation. Here the testimony varies.

Both plaintiff and her husband positively testify that Hammond agreed to advance $100 in payment of the claim if they would execute a deed as security for that amount It is not disputed that at this time Hammond had a number of notes and other securities of plaintiff's husband in his hands for collection, and that he acted for plaintiff's husband in the matter. Defendant Powell at this time was in the employ of Hammond, and he claims that he purchased the land absolutely for $100, and that there was no other agreement. He says, however, that he was not present at the time the deed was executed by the plaintiff, and that he had no conversation with her about the matter. On the contrary, she and her husband testified that the defendant was present and went with Hammond down to plaintiff's house to procure her acknowledgment of the deed, and Hammond explained to her that he took the deed in the name of the defendant because he, Hammond, was a lawyer and notary public and did not want the title in his own name. It is further in evidence that to procure this money Hammond and the defendant executed a note to one of the banks at Lexington, and forwarded the money so obtained to the machine company. Hammond died before the note matured, and defendant took it up at the bank. Afterwards, defendant collected a claim of over $500 due plaintiff's husband from an insurance company, and retained an amount equal to what he had advanced, with interest, from this fund. Plaintiff's husband testified positively that he talked with defendant about the matter, and defendant told him the exact amount due for the money advanced to the company, the taxes paid, and deeds recorded in the transaction, and that he withheld this amount from the funds in his hands by agreement, and that defendant then agreed to reconvey the property to plaintiff. Defendant denies this agreement, but admits that he retained about the amount of money testified to by plaintiff's husband, but claims that he applied this to a claim that a coal company had against plaintiff's husband. It is in evidence that plaintiff has

lived on the land ever since the execution of the deed, and that she has never in any manner recognized defendant's claim of ownership of the premises. There is not a syllable of testimony that plaintiff ever agreed to execute the deed to the premises for any other purpose than that of securing the $100 advanced by Hammond for the satisfaction of the McCormick mortgage. In view of this record, we reach the same conclusion as the learned trial judge, and recommend that the judgment below be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARY JOHNSON V. CHARLES OWEN ET AL.

FILED OCTOBER 5, 1904. No. 13,627.

1. **Contract:** PUBLIC POLICY. Where a plaintiff claims that a certificate of deposit in the sum of $300 was indorsed and delivered for him to a county attorney under an agreement that, in consideration thereof, he would dismiss a criminal prosecution against plaintiff and release him from jail, a court will not aid him to regain possession of the property. Such a contract or agreement is illegal, against good morals and public policy, and the court will leave the parties in the same position in which it finds them.

2. **Duress:** EVIDENCE. Under the evidence in this case, *held*, that no fraud or duress has been shown.

ERROR to the district court for Saunders county: BENJAMIN F. GOOD, JUDGE. *Reversed.*

Simpson & Good, for plaintiff in error.

O. C. Tarpenning and *B. E. Hendricks, contra.*

LETTON, C.

This action was begun in the district court for Saunders county by Charles Owen, plaintiff, against John L. Sundean, Charles H. Slama and Mary Johnson, defendants, to recover the possession of a certain certificate of deposit in the bank of Memphis, Nebraska, dated February 9, 1903, which certified that "Frank M. Owen has deposited with the bank of Memphis $300 payable to the order of J. L. Sundean, county attorney, in current funds on the return of this certificate properly indorsed." An order of delivery was issued, and the certificate was taken by the officer and delivered to the plaintiff. The defendant Mary Johnson appeared by a guardian *ad litem,* E. E. Placek, and filed her separate answer, denying generally the allegations of the petition; and the defendants Sundean and Slama each filed separate answers disclaiming any interest in the property, and setting up specifically the facts under which each alleges the property came into his possession. At the close of the testimony for the plaintiff, the defendants moved for an instruction in their favor, which was overruled by the court and exception duly taken; whereupon they offered no evidence, and upon the motion of the plaintiff a peremptory instruction was given by the court instructing the jury to find for the plaintiff. Separate motions for new trial were filed, and, the defendants Sundean and Slama not prosecuting error, the defendant Mary Johnson joined them with the plaintiff as defendants in error and has brought the cause to this court for review.

The facts appear to be as follows: In the latter part of 1902, the plaintiff Charles Owen became acquainted with the defendant Mary Johnson and with her mother and stepfather, Mr. and Mrs. Frank Abbott. Within two months after he first became acquainted with Mary Johnson, a complaint was filed against him before a justice of the peace at Ashland, charging him with statutory rape upon the plaintiff in error, Mary Johnson. About the

time this was done, Owen absconded and went to Montgomery county, Missouri, reaching there about the 23d or 24th of December, 1902. Five or six days after his arrival he was arrested by the city marshal and placed in the county jail where he was detained about five days, and at the expiration of this time was released, no charge having been filed against him. While he was in Missouri, John L. Sundean, the county attorney of Saunders county, together with the sheriff of Saunders county, went on Sunday, January 8, to the town of Memphis in Saunders county, Nebraska, near which place Owen had lived in his father's family. Levi Owen, the father of Charles Owen, was sent for and at the office of one John Morrow a conversation was had between the county attorney and Levi Owen with reference to the settlement of the charges against the son. According to the testimony of Mr. Owen, Sr., and the sheriff, the county attorney offered to dismiss the criminal proceedings against the young man upon the charge of rape, upon the payment to him of the sum of $300, and an agreement was arrived at between them that if $300 were paid to the county attorney the next day the son would not be prosecuted further upon the charge of rape. Sheriff Webster, however, testifies in this connection that no final agreement was made with Levi Owen on Sunday; that he said he could not do anything until he saw Frank. It further appears that Frank Owen, a brother of the plaintiff, was at this time in Wahoo consulting an attorney with reference to the charge against Charles Owen, and that after he returned a conversation was had over the telephone between Sundean, at Wahoo, and John Morrow and Frank Owen, at Memphis. Frank testifies that Sundean talked with Morrow but that he could hear every word; that Sundean asked $300 to settle the trouble, and that after some conversation it was agreed that he would be paid $300 upon the condition that he would release Charles Owen at once. Frank then deposited $300 in the bank of Memphis and obtained the certificate of deposit in controversy. He

indorsed upon the back of it, "Pay to J. L. Sundean, county attorney," and sent the certificate to Sundean the next day. He testifies that Charles Owen, before he went away, authorized him to settle any trouble he might have over Mary Johnson, and that the money belonged to Charley; Levi Owen testifying that he furnished part of the money. Some time after Sundean obtained this certificate, he indorsed it, "Pay to the order of Charles H. Slama, county judge. J. L. Sundean, Co. Atty." and left it with the county judge from whose possession it was taken under the writ of replevin. No evidence being offered on the part of the defendants, the purpose of the county attorney in this peculiar proceeding cannot be definitely known, but from numerous suggestions in the questions propounded to the witnesses upon cross-examination it would seem that the county attorney's purpose was to settle any claim which Mary Johnson might have against Charles Owen on account of his being the putative father of a child of which she was expected to be delivered. This, however, is merely inference and is contradicted by the testimony of Levi Owen, Frank Owen and J. R. Webster, the sheriff of Saunders county. Upon the testimony of the plaintiff's witnesses, then, we have it stated that the purpose of the deposit of the $300 in the bank, and of the indorsement and delivery of the certificate of deposit to the county attorney, was to procure the dismissal of a criminal charge against the plaintiff in this case and his release from jail, and further that before the plaintiff left for Missouri he had authorized his brother Frank to procure a settlement of any proceedings which might be brought against him.

It was attempted to bring the plaintiff within the principles of law applicable to cases where a person has been compelled to pay money or deliver up valuable property by means of duress, but the evidence shows that no money was deposited in the bank, nor was the certificate sent to the county attorney until after Frank Owen, the man who deposited the money and to whom the certificate of

deposit was originally delivered, had consulted an attorney with reference to his brother's case; and further, the conversation over the telephone wherein the negotiation was had between the county attorney, at Wahoo, and Frank Owen, at Memphis, fails to show the existence of any fear or compulsion acting upon the mind of Frank other than the fear of the consequence of a criminal prosecution. We have here, then, a plain case—accepting the plaintiff's version of the transaction as true—of money being paid to a public officer for the purpose of inducing him to dismiss a criminal charge and procuring the release of a prisoner, since the delivery of the certificate, properly indorsed, amounted to a transfer to Sundean of the fund deposited. Where a party has, in carrying out an illegal agreement, placed himself in a certain position, the courts will not lend their assistance to him to retrace his steps. If he has parted with any property or money in furtherance of his unlawful object, the court will leave him where it found him, and will not lend him its assistance against his fellow wrongdoer. It is unnecessary to cite authorities to the proposition that such an agreement as is testified to is manifestly against good morals and public policy, and that no court will aid a party to it, either to carry out its provisions, or to rescind it and recover property parted with in the execution of the same. The defendant in error argues that he had not committed a crime; that he did not authorize any person to pay the county attorney any sum of money; and that since the county attorney obtained the certificate by duress he can maintain this action; but if he did not authorize Frank Owen to deposit this money and to deliver the certificate of deposit to the county attorney, the transaction was not his act and he could not be injured by the unauthorized act of Frank. The evidence, however, is uncontradicted that he authorized Frank to settle the matter for him, and further, since he claims the certificate of deposit as his own, he has adopted and ratified his brother's action in its entirety. He cannot blow hot and cold at the same time. We conclude there-

fore that the action taken by his brother binds the defendant in error as fully as though it had been taken by himself.

The agreement between Frank and the county attorney was fully executed, so far as the plaintiff was concerned, by the delivery of the certificate properly indorsed. The contract is not executory, but fully executed on the plaintiff's part; hence the authorities as to executory contracts do not apply.

Under the facts in this case, the plaintiff is entitled to no relief in this action, and the judgment should be reversed and the cause remanded to the district court for further proceedings in accordance with this opinion.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLEES, V. RICHARDSON COUNTY ET AL., APPELLANTS.

FILED OCTOBER 5, 1904. No. 13,045.

1. **Case Followed.** *Chicago, B. & Q. R. Co. v. Richardson County*, 61 Neb. 519, followed.

2. **Act Constitutional.** Sections 39 and 40, article I, chapter 77, Compiled Statutes, 1901, are constitutional and valid.

APPEAL from the district court for Richardson county: JOHN S. STULL, JUDGE. *Affirmed.*

Smyth & Smith and *John Gagnon*, for appellants.

Charles F. Manderson, J. W. Deweese, Francis Martin and *Frank E. Bishop, contra.*

H. H. Baldrige, C. C. Wright, J. P. Breen and *W. H. Herdman, amici curiæ.*

POUND, C.

The facts in this case are the same as those involved in *Chicago, B. & Q. R. Co. v. Richardson County,* 61 Neb. 519, except that assessments for different years are in question. A further point is made on behalf of the county, however, not raised in the former case, namely, that sections 39 and 40, article I, chapter 77, Compiled Statutes, 1901, are unconstitutional. This point has been argued with no little ability and ingenuity, on the part of appellants, and is of such importance as to require our careful consideration.

Four objections are made to the plan for assessment of railroad properties prescribed by said sections. The first is that "sections 39 and 40, in legal effect, exempt the franchises of the railroad corporations from taxation and thereby violate section 1, article 9 of the constitution." This contention is disposed of sufficiently, in our opinion, by *State v. Savage,* 65 Neb. 714, in which this court held, construing the sections in question, that "the state board of equalization, in the assessment of railroad and telegraph properties, should include in its assessment the value of the franchise with the tangible property assessed." HOLCOMB, J., delivering the opinion of the court, at page 750, says:

"It seems reasonably clear that in assessing railroad and telegraph property as contemplated by sections 39 and 40, the whole property belonging to any one corporation, and subject to assessment in this state, should be valued for tax purposes in its entirety, and that in such valuation should be included all elements going to make up the entire property, whether consisting of franchises or other intangible property, or physical property, be it real, personal or mixed."

Next, it is asserted, to quote from the brief of counsel, that "the statute, sections 39 and 40 of the revenue law, for the assessment of railroad property provides a different mode of assessment for that property from that which

is provided for the property of the citizen, and is, therefore, void, as violating the uniformity required by the constitution." Section 1, article 9 of the constitution, reads, in part: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct." Construing this section, the court said in *State v. Savage, supra*:

"The paramount object of the constitution, and the laws relative to taxation, as we conceive the rule to be, is to raise all needful revenues by valuation of the taxable property so that each owner of property taxed will contribute his or its just proportion of the public revenues."

If properties are so essentially distinct in their nature that to assess each in one particular way would not result in requiring the respective owners to pay taxes in proportion to the value of their respective properties, it is evident that an attempt to provide a uniform method of assessment would involve contravention of the "paramount object" of the constitution. Hence, it is the result, not the method employed in reaching it, which must be considered. Counsel point out that section 52 of said chapter directs the assessor, when valuing real property generally, to fix "the value of each tract or lot improved, the value of each tract or lot not improved, and the total value," while the state board of equalization, in valuing a railroad, is directed, as counsel put it, to "lump the whole thing, whether it be buildings, lots, tracts of land or personal property, and put a price upon the heap." But the two species of property are in no wise comparable. What sort of result should we get if a local assessor, assessing 10 miles of road, was required to value the right of way unimproved, the right of way with ties and rails laid upon it, and the total value? What gives the 10 miles of track their real value is the franchise of the corporation operating them, the connections in and out of the state, and the

fact that they are part of a great system of railway, operated as a whole. An attempt to assess the track of a railway in any one county by the statutory method of assessing houses and lots, would produce gross inequality, and enable the most valuable features of railroad properties to escape taxation. It is said that the scheme of dividing the total value by the number of miles in any county is arbitrary. But the real question is whether it provides a reasonable mode of ascertaining the value of that portion of a railroad lying in a given country, so as to insure that the corporation contribute its just proportion of the public revenues. The track in any one county is not an entity. It is merely part of a whole, spreading over many counties, or even many states. The value of each such part is obviously the proportion which it bears to the whole. Viewed by itself, apart from its place in the whole, it is merely a ditch and grade, bearing ties and old iron.

The third objection is that the system provided by the sections in question "exempts railroad property assessed by the state board of equalization from the payment of its proportion of the taxes levied for the support of the county, school district and city, appellants in this action, and thereby violates the rule of uniformity prescribed by section 1, article 9 of the constitution." As the municipality in question is not a city of the metropolitan class nor of the first class, in which different standards of assessment prevail from those employed in the state at large, this case does not involve the question expressly left open by the opinion of HOLCOMB, J., in *State v. Savage, supra.* Here the same assessment serves for county and municipal purposes alike as to all property. Of course the presumption is that both the board of equalization and the local assessors act fairly and impartially, and fix a just and true valuation. *State v. Savage, supra.* Hence the question is whether, assuming that they do so, a proper proportion of the burdens of municipal taxation is thrown upon the railroad companies. This question depends upon

the view taken as to the nature of railroad property. If the railroad is an entity, we have one piece of property, spreading over several counties; if that portion within each county is a separate entity, then a valuation of such separate entity should be made in each county, as in other cases. We do not think this matter admits of debate. Bridges, depots, water tanks, roundhouses, and other necessary structures upon the right of way, are as much parts of the railroad as a whole as a permanent building upon land is annexed to and a part of the land. They have no separate existence apart from the road, but go to make up the one entity called the railroad. So thoroughly is this true, that they will pass by mortgage or conveyance of the road without being named expressly. *Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267, 30 L. ed. 1210; *United States Trust Co. v. Wabash, St. L. & P. R. Co.*, 32 Fed. 480. If, as held in the latter case, a hotel on the right of way of a railroad, operated in connection therewith for the accommodation of its patrons, is a mere appurtenance to the road, covered by conveyance of the road, without express mention, how much more is this true of bridges, depots and the like? But if these are not separate entities, to be dealt with apart from the road as such, it follows that the municipality cannot claim to have within its borders certain specific railroad property, but only a certain proportion of the whole road. This is the view taken by the statute, and we think it well-founded and reasonable. Apart from the road as a whole, the bridge is only so much junk; severed from the road, the depot is of little or no value. Each is made specially to be a part of the whole line, and to treat it as a separate entity is to take away its chief value. If the road as a whole is valued correctly, the several portions in each county cannot fail to be justly valued when assessed at the proportion they bear to the whole. *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 220, and cases cited.

Finally, it is said that the statute makes a classification not authorized by the constitution. In our view the classi-

fication is made, not by the statute, but by the nature of the subjects dealt with. They are intrinsically and fundamentally distinct, and the legislature, which is given the power expressly to fix the mode of assessment as it may direct, has adopted a method which has been in operation many years, has been readopted in the new revenue law, and is reasonably calculated to meet the problem in hand. Any method would doubtless be open to some objection in its practical workings. But if the method chosen may be carried out so as to produce uniformity of taxation in proportion to the value of property, as contemplated by the constitution, it is constitutional and valid.

Two further objections to the statute have been urged by counsel who appear as friends of the court. The first is that it operates unequally and unreasonably with respect to railroad companies whose tracts are situated wholly within one county, such, for example, as terminal and belt line companies. The arguments advanced on this ground, however, apply rather to the constitutionality of provisions in the several statutes governing municipalities, whereby the valuation of railroad properties for state and county purposes is required to be taken as a basis of assessment in such municipalities made on a different basis, than to the constitutionality of the general statutory provisions with reference to state and county assessments. So far as they apply to the sections here in question, we think they are met sufficiently by what has been said already. The other objection is that the statute contravenes the constitutional guaranties that no person shall be deprived of property without due process of law, in that it does not provide for notice to the companies assessed of the meeting of the state board of equalization, and does not provide for notice to other taxpayers of the meeting of such board, in order that they may insist upon proper equalization of their assessments with those of the companies in question. The statute provides a date upon which railroad companies within the purview of the act shall make returns. It provides a place where the meeting

of the state board of equalization shall be held, and provides expressly that such meetings shall take place as soon as practicable after the returns are filed. These provisions must be construed, if possible, in such manner as to make them constitutional and valid. If the statute had said that the meeting should be held immediately upon the return required to be made by the railroad companies, there could be no question that the time and place were stated with sufficient certainty. But it is well settled that "immediately" means "as soon as practicable," and conversely it is proper to construe "as soon as practicable" to mean "immediately." *Huff v. Babbott,* 14 Neb. 150; *Lydick v. Korner,* 13 Neb. 10. So long as the time and place of the meeting of the state board of equalization are thus fixed with such certainty as to enable the companies to know by reference to the statute at what time and at what place their properties will be assessed and valued, we perceive no merit in the objection. The state board of equalization is a public board. Its meetings are public, and as a matter of fact and practice the corporations have always been accorded a hearing before it. Where the statute names the time and place for the meeting of the assessing board, personal notice is not necessary. *Kentucky Railroad Tax Cases,* 115 U. S. 321; *State Railroad Tax Cases,* 92 U. S. 575, 610; *Pittsburg, C. C. & St. L. R. Co. v. Backus,* 154 U. S. 421. If returns are made as required by the statute, all citizens are advised by the terms of the statute as to the time and place of the meeting of the state board of equalization. If any company fails to make a return, five days are provided for during which the delinquent return may be received. At the expiration of such five days, the auditor, a public officer, is required to obtain the necessary information, and a meeting of the state board of equalization is to be held "as soon as practicable," or in other words, immediately. These provisions of the statute would seem to afford other taxpayers a sufficient opportunity to be heard with reference to the assessment of the companies in question for the

purpose of insuring uniformity and equality in taxation. The practice has always been in accordance with this interpretation of the statute, and we think the sections in question will reasonably bear such construction.

We therefore recommend that the decree be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLEES, V. CASS COUNTY ET AL., APPELLANTS.

FILED OCTOBER 20, 1904. No. 13,292.

1. **Res Judicata.** "A 'right, question or fact' distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, and this even though the second suit is for a different cause of action." *State v. Broatch*, 68 Neb. 687.

2. **Taxes: CAUSE OF ACTION.** A claim for taxes under the assessment for one year is not the same cause of action as a claim for taxes on the same property under an assessment for a prior year.

3. ———: **RES JUDICATA.** If the liability of property to taxation depends upon the existence of a specific fact, and that fact is necessarily determined in one litigation, it cannot be controverted by the same parties in a subsequent litigation.

4. ———: ———. The west half of the railroad bridge over the Missouri river owned by the company which operates through passenger and freight trains continuously through different counties of this state to and over said bridge, and thence through adjoining states, is "a part of the continuous line of road" within the meaning of sections 39 and 40 of the revenue act in force in 1901 (Compiled Statutes, ch. 77), and is assessable for taxation by the state board and not by local assessors, and a prior adjudication that such bridge so used is not "a part of the continuous line of road" is not an adjudication of fact, and will not operate as an estoppel against the parties to such prior litigation.

5. **Question of Law.** The question whether such bridge so owned and used is "a part of the continuous line of road," within the meaning of said statute, is a question of law, and not a question of fact upon which an estoppel can be predicated.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

Jesse L. Root, for appellants.

J. W. Dewcese, Byron Clark and *F. E. Bishop, contra.*

C. C. Wright and *W. H. Herdman, amici curiæ.*

SEDGWICK, J.

The principal questions involved in this case are identical with those stated and discussed in *Chicago, B. & Q. R. Co. v. Richardson County, ante,* p. 482, which follows and approves *Chicago, B. & Q. R. Co. v. Richardson County,* 61 Neb. 519, and also in *State v. Back, ante,* p. 402.

There is another question presented in this case which has been thoroughly discussed in the briefs and in the oral argument upon the rehearing. The bridge in question in this case was assessed by the local officers for taxation for the years 1881 to 1885, inclusive, and in the year 1886 the railroad company, having paid those taxes under protest, brought an action in the district court for Cass county to recover the amounts so paid. Afterwards that action was brought to this court, and was determined against the company. *Cass County v. Chicago, B. & Q. R. Co.,* 25 Neb. 348. It is contended that by the judgment in that case the questions involved in the case at bar are *res judicata.* The local authorities assessed this bridge for taxation for the year 1901, and the company brought this action to restrain the collection of the taxes. The district court enjoined the collection of the taxes as prayed, and the case was brought to this court by appeal. The subject matter of the former litigation was the taxes

assessed against this property for the respective years therein named, and the subject matter here is the taxes assessed for the year 1901, so that it cannot be said that the two cases involved the same subject matter, and, strictly speaking, the judgment in the one case could not have been *res judicata* of the subject matter involved in the other. *State v. Savage,* 64 Neb. 684, 703; *State v. Broatch,* 68 Neb. 687.

The real question in dispute between the parties is whether in the former action the rights of the parties and questions of fact, then in dispute between them, have, by that case, been adjudicated so as to estop the parties to that litigation from now questioning the facts so determined. It was said by this court in *State v. Broatch,* 68 Neb. 687:

"A judgment, rendered by a court of competent jurisdiction, determining the rights of the litigants on a cause of action or defense, is an effectual bar against future litigation over the same right determined by such judgment, and is for all time, unless reversed or modified, binding on the parties and their privies in estate or in law. A 'right, question or fact' distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, and this even though the second suit is for a different cause of action."

Of course, the propositions of law that were advanced by the court as requiring the disposition made of the issues in the former case, if afterwards found to be erroneous, would not be binding upon the court in subsequent litigation between the parties involving a different cause of action. *State v. Savage, supra; State v. Broatch, supra.*

Many authorities are cited and ably discussed in the respective briefs of counsel. Our labors have been much lightened by those discussions and by the oral arguments at the bar. There is substantially no difference of opinion upon the controlling legal principle involved. Specific facts that are so involved in a litigation that the result of

the litigation depends upon the determination of these facts are necessarily settled by that litigation, and the authorities substantially agree that such facts so determined cannot afterwards be controverted by the parties to the former litigation. To determine, then, the question before us, it is necessary to ascertain what facts controlling the rights of the parties in the former case were adjudicated, and how far those facts so ascertained are involved in and necessarily control the decision in this case. The petition in that action alleged that the plaintiff "owns the line of railroad extending from Pacific Junction, in Mills county, Iowa, westwardly across the Missouri river, and through the counties of Cass, Lancaster and other counties farther west in the state of Nebraska; and that it has owned and operated said line of railroad since the 1st day of January, 1880; and that said line of road and property thus owned by the plaintiff is situated in more than one county in the state of Nebraska." The answer alleged "that the said railroad bridge, which spans the Missouri river at Plattsmouth, Nebraska, is a separate and independent structure from the 'roadbed and right of way' of said railroad company," and further alleged "that said railroad bridge has never been operated and controlled by said plaintiff, either in the states of Iowa or Nebraska, as a continuous part of its roadbed and main track; on the contrary, defendant avers and charges that said bridge has been maintained and operated by said corporation plaintiffs always since its construction as a separate and independent structure from its main line."

In the brief for the county in the case at bar it is said: "The real controversy between the railway company and the county of Cass is the right of the local officers to assess and tax the west half of the bridge across the Missouri river near Plattsmouth, in said county," and again, "We now ask this court to say whether in the district court in said cause the issue of fact as well as of law was not raised, litigated and determined."

It is insisted that after the former case had been brought

to this court, and the judgment of the lower court therein reversed and the cause remanded, the case was dismissed and no final judgment entered in the lower court, and that therefore the issues therein presented were not finally adjudicated. If our attention had been called to a showing in this record that the plaintiffs had been allowed by the court to dismiss their former proceedings without prejudice to a future action, we would feel it incumbent upon us to discuss the effect of such dismissal. As it is, we think the question before us is fairly stated by counsel for the county in the foregoing quotation from the brief. It was said in the opinion of the court in the former case that it was alleged in the petition that the taxes "were unlawfully levied and collected, for the reason that the bridge was, at all times, a part of the line of railroad of defendant in error, and legally taxable only as the other portions of the road were taxable; and that the same was for each year reported to the state board of equalization as a part of the railroad, and taxed accordingly, all of which taxes had been paid," and that the answer consisted mainly of specific denials of the allegations of the petition, and "alleged that the bridge was not legally taxable by the state board of equalization; that it was not a part of the roadbed of defendant in error's road; that it was not operated as a part of said road; that it was listed to the precinct assessor for taxation by the duly authorized officers of the railroad company, and that it was legally subject to taxation by the county." The language might indicate that the writer of the opinion considered that the general question whether the bridge was "a part of the line of said road" was the ultimate fact to be determined, and was a simple question of fact upon which the decision in controversy depended; but in construing this language of the learned author of that opinion, it must be borne in mind that he was not discussing a question of *res judicata*. It was not necessary for him to discuss the question whether the result of the litigation depended upon the determination of disputed questions of fact, or depended

upon the application of legal principles to conceded facts.

Although a claim for taxes under the assessment for one year is not adjudicated by a prior adjudication of the validity of a tax upon the same property under assessment for a different year, still, if the liability to taxation depends upon a charter right of exemption, the adjudication of that charter right in one litigation will estop the parties thereto to question that exemption in subsequent litigation. This was distinctly held in *New Orleans v. Citizens Bank*, 167 U. S. 371, 17 Sup. Ct. Rep. 905. This is a case much relied upon by the appellant in the case at bar. The thing in litigation upon which the right to collect the tax in that case depended was the contractual exemption of the bank under its charter, and, it having been determined in the prior litigation that such contractual relations existed, it was held that the parties were estopped to deny it in subsequent litigation. The adjudication of a contract right is an adjudication of fact, and a judgment that necessarily involves the question of the existence of a charter or contract right will be binding upon the same parties in future litigation involving the existence of that right. The existence of such contract right was held to be the thing adjudicated in the former litigation. The court said:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies." Some of the leading cases are then reviewed to illustrate this rule and the court said further: "In *Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. 137, and *Mason Lumber Co. v. Buchtel*, 101 U. S. 638, it was held that when the proper construction of a contract was in controversy, the construction adjudged by the court would bind the parties in all future disputes."

When the court construes a contract and determines the fact that the contract exists with the construction given it, and the rights of the parties are made to depend upon the existence of such contract, the parties are estopped in future litigation to deny its existence.

In *Chicago, B. & Q. R. Co. v. Richardson County*, 61 Neb. 519, it is made plain that the court was construing the statute and merely applying its provisions to conceded facts. The court said:

"It is conceded by defendants that the bridge over the Missouri river at Rulo, on the west half of which the taxes in dispute were levied, is owned and used by plaintiff as a part of its continuous line of track," and after quoting at large sections 39 and 40 of the statute, it was further said: "It needs no argument to show that the railroad bridge at Rulo is neither a machine shop, a general office building or a storehouse; and if this bridge, within the meaning of the statute, is neither real nor personal property outside the right of way of plaintiff, it is not to be assessed by the local assessor, but is taxable only by the state board of equalization. There is no claim that it is exempt from taxation, the only controversy being as to the jurisdiction of the taxing powers. If it is inside, *i. e.*, a part of, the right of way, as the term is employed in the act, then it must be assessed by the state board, otherwise not. The meaning of the term 'right of way,' as employed by the statute, is important, indeed, decisive of the question."

This fact is made the basis of the decision. Manifestly all other matters discussed in the opinion are legal questions and relate to the construction of sections 39 and 40 of the revenue law (Compiled Statutes, 1901, ch. 77). Clearly this does not make the determination of the question depend upon any disputed fact. It is held that the fact which is here recited, "if the bridge is inside the right of way as the term is employed in the act," then it must be assessed by the state board. It is in that case, and in the two later cases above referred to, determined as matter

of law that the proper construction of the sections of the statute under consideration is that a bridge which is used by a railroad company as a part of its continuous line of track is assessable by the state board and not by local assessors. The determination of these cases was made to depend upon the existence of this fact alone. It is manifest that this fact was not contested in the prior litigation relied upon as an estoppel in this case. The pleadings in that case will not admit of the construction that an issue was tendered as to whether the property of the railroad company was situated in more than one county, or as to whether the railroad company owned the bridge in question, or as to whether it used the bridge as a part of its continuous line of track, or as to whether the bridge was inside the right of way within the meaning of the statute as it is now construed. The question contested was whether these facts brought the case within the provision of section 39, and it was erroneously determined that they did not. The court, in determining whether the conceded ultimate facts constituted the bridge in question a part of the continuous line of road within the meaning of the statute, said that it was shown that much higher rates were charged for the transportation of passengers and freight across the bridge than over any portion of defendant's road, and that while, in fact, so far as the running of trains and transportation of passengers was concerned, no change or transfer was made, yet additional burden was placed upon all for crossing the bridge. It was said: "To that extent, at least, the road was not operated as a continuous line." Other facts are mentioned in the opinion as tending to show that the road was not operated as a continuous line. Upon consideration of all these facts, none of which were in dispute, it was concluded that the road was not operated as a continuous line within the meaning of the law. This construction of the law has been found to be erroneous, and it is by the later decisions declared to be the law of this state that the facts which have always been conceded to exist

constitute the bridge a part of the continuous line of road within the meaning of the statute. The facts, then, to which the construction of the statute is applied are not in controversy in this case, and have never been controverted, but always conceded or assumed in all the similar litigation. It follows that neither party is estopped to assert these essential facts. The other questions presented by the record are sufficiently discussed in the opinions above referred to.

The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. FRANK N. PROUT, ATTORNEY GENERAL, V. NORTHWESTERN TRUST COMPANY.

FILED OCTOBER 20, 1904. No. 13,606.

1. **Instalment Investment Company.** If the organization of a corporation and its plan of doing business involve receiving from each of its members a stated sum at stated intervals until a specified amount is received from such members, and investing this money in property for the benefit of its members, it is an instalment investment company within the meaning of chapter 29, laws of 1903. Compiled Statutes, chapter 16, sections 216-227.
2. **Power of Legislature.** It is competent for the legislature to provide for publicity of the condition and business methods of such corporations, and to make reasonable classification of corporations, companies and individuals for that purpose.
3. **Constitutional Law.** The statute in question is not in violation of article III, or of section 1 of article VI, of the constitution, nor does it give the state banking board such arbitrary powers as to be unconstitutional for that reason.

ORIGINAL action in the nature of quo warranto to oust respondent of its franchise. Heard on demurrer to answer of respondent. *Demurrer sustained. Judgment of ouster.*

Frank N. Prout, Attorney General, and *Norris Brown,* for relator.

A. L. Knabe, contra.

SEDGWICK, J.

This is an original action in this court to oust the defendant corporation of its franchise and annul its powers and privileges. As ground for these proceedings, it is urged by the attorney general that the defendant is an instalment investment company, and has not procured from the state banking board a certificate of approval as the statute requires. The question is presented upon a general demurrer to the answer of the defendant. In the answer it is confessed that no application has been made to the state banking board for its certificate of approval. It is insisted by the defendant that the defendant is not an instalment investment company within the meaning of the statute, and that the statute in question is unconstitutional and void.

1. The defendant shows the plan and scope of its organization and business in its answer. A copy of its contracts with its members is attached thereto. By this plan the defendant collects from its members $5 a month, and obligates each member to pay $5 a month for 30 months, and thereafter $15.70 a month until $1,000 are paid. This money is to be invested in homes for the benefit of the members. The statute in question is entitled "An act to provide for the government, regulation, examination, reporting and winding up of the business of certain corporations, associations, companies, copartnerships and individuals engaged in the business of raising money from members or others, by means of stated instalments or payments, to be held, invested or disbursed in accordance with certain plans or schemes; to designate such corporations, associations, companies, copartnerships or individuals as instalment investment companies." The first section of the act provides: "Every association * * * which is or shall be organized for the purpose of raising money from its members or others, by means of stated instalments or payments, to be held, invested or disbursed by said association, whether the money so contributed is

paid in for shares in such association, or is held by the association for investment and accumulation for the benefit of the contributors, or as an advance on merchandise, or property of any kind, to be delivered in the future, or is held by the association to be disbursed among the contributors, or any of them, in accordance with any agreed plan or scheme, and whether the relation of the contributor to the association be that of a member, shareholder, vendee, creditor or beneficiary of a trust; * * * shall be known for the purposes of this act, as an instalment investment company." Laws of 1903, chapter 29; Compiled Statutes, chapter 16, sections 216-227 (Annotated Statutes, 6649-6660).

There can, of course, be no question that the defendant company is within the purpose of the act as disclosed in the title, and within the language of the act itself as shown in the foregoing quotation. The defendant suggests that the money contributed by the members "never in any event becomes the property of the defendant," and seems to urge that because of this fact it is not an instalment investment company. Of course, this fact is made immaterial by the express language of the statute. If the corporation is "organized for the purpose of raising money from its members by means of stated instalments or payments," and the money so raised is either held, invested, or disbursed by the corporation for the benefit of the contributors, or among the contributors or any of them, "in accordance with any agreed plan or scheme," the company "shall be known for the purpose of this act as an instalment investment company."

2. The statute exempts building and loan associations, savings banks, insurance companies, and fraternal beneficiary associations from its provisions. This is said by the defendant to render the statute repugnant to the 14th amendment of the constitution of the United States. The reason for this conclusion seems to be that the companies and associations so exempted "may engage in an instalment investment business without requiring them to ob-

tain the permission of the banking board, or subject them to penalties imposed by the statute." It is urged that the business of these companies by its very nature is within the spirit of the statute, and that as such companies are generally organized and conduct their business, they would ordinarily come within the letter of the statute also. There might be some reason to question the policy of the statute if these exempted companies and associations were relieved from supervision by the state. The legislature has provided by other statutes for their regulation and supervision, which is the manifest reason for exempting them from the provisions of this statute. The classification attempted by the legislature is not unreasonable and arbitrary, and no sufficient objection is urged to the power of the legislature to make such classification. It cannot therefore be said that any discrimination in that respect has been made against instalment investment companies as they are defined in this statute.

3. Again, it is urged that the statute in question is in violation of article III, and section 1 of article VI, of the constitution of this state. This thought is derived from the supposition that by this statute the state banking board is given judicial powers. The statute does not confer judicial powers on the state banking board. *Crawford Co. v. Hathaway,* 67 Neb. 325.

It is also objected that the 9th section of the act gives the state banking board arbitrary power to revoke the certificate of approval, and that the "action of the board so taken shall be sufficient authority for the appointment of a receiver," but this is not the meaning of the section in question. The provision is that, if it appear that grounds therefor exist, the board shall revoke the certificate; that is, if the grounds provided by statute for such revocation exist, and the facts are made to appear to the board, they shall revoke the certificate; and the further provision is that the attorney general shall apply to the proper court for the appointment of a receiver, and, if such fact or facts be made to appear (that is, to

the court), it shall be sufficient to authorize the appointment of a receiver, etc. The objections urged to the statute might be urged generally to other similar statutes to regulate building and loan associations and fraternal insurance associations and others. These objections are not very extensively argued or strenuously insisted upon in the brief, and we cannot see that the statute should be held unconstitutional for any of the reasons presented by the defendant. It follows that the defendant, not having complied with these provisions, is transacting its business unlawfully. It is urged by the attorney general that the scheme of the defendant is such as to bring it within the prohibition of our statute against lotteries; and that the defendant's business is unlawful because it involves the entering into contracts which cannot be performed on the part of the defendant. It does not appear to be necessary to examine and discuss those questions in advance of the action of the state banking board.

The demurrer to the answer is sustained, and judgment of ouster will be entered as prayed.

JUDGMENT OF OUSTER.

JOHN BLAIR V. STATE OF NEBRASKA.

FILED OCTOBER 20, 1904. No. 13,611.

1. Information: ELECTION. When an information contains two or more counts charging distinct and separate offenses of the same nature, the trial court may, in the exercise of a sound discretion, require the county attorney to elect on which count he will rely for a conviction, either before the commencement of the trial, or after the state has produced its evidence in chief, and before the accused is required to make his defense.

2. Motion to Quash. Record examined, and *held* that the defendant's motion to quash the second and third counts of the information was properly overruled.

3. **Demurrer to Evidence.** Evidence contained in the bill of exceptions examined, and found sufficient to resist the demurrer of the defendant thereto, and his motion to require the court to direct the jury to return a verdict in his favor.

4. **Rulings.** *Held*, that the record discloses no reversible error in receiving and rejecting evidence.

5. **Evidence** is relevant which shows that the accused has threatened or assaulted a witness, has endeavored to prevail on him to abscond, has procured his absence, has endeavored to induce him to testify falsely, or has concealed the whereabouts of such witness from the prosecution; and such conduct on the part of an accused person is an incriminating circumstance to be weighed by the jury in determining the question of his guilt.

6. **Statutory Rape: EVIDENCE.** In a prosecution for statutory rape, frequent acts of improper familiarity between the parties implicated may be received in evidence to prove their adulterous disposition toward each other.

7. **Leading Questions.** The trial court may, to a reasonable extent, permit leading questions to be propounded, on direct examination, to a hostile or reluctant witness.

8. **Continuance.** Record examined, and *held* that defendant's application for a continuance, after the prosecutrix had changed her evidence, was properly denied.

9. **Reopening Case.** It is within the sound discretion of the trial court to permit a party, in furtherance of justice, to reopen his case and introduce other and further evidence at any time before the close of the trial; and where it is made to appear that there has been no abuse of discretion, and the substantial rights of the opposite party have been in no maner prejudiced by such a course, error cannot be predicated thereon.

10. **Assistant Counsel.** An objection to the appearance of private counsel to assist the county attorney in conducting a criminal prosecution, to be available, should be made at a suitable time and in the proper manner, and must be supported by at least some showing that the county attorney did not request or require any assistance, and the court had not appointed such counsel for that purpose.

11. ———. *Held*, that a general objection to the appearance of such counsel made during the trial in connection with the examination of a witness, and without any showing to support it, was properly overruled.

12. **Instruction.** The fact that a single clause of an instruction is incomplete is not sufficient ground for a reversal, if, when the whole

paragraph is read and construed together, its meaning is clear and certain, and it appears from the record that the jury could not have been misled thereby.

13. **Evidence** reviewed, and *held* sufficient to sustain the verdict.

ERROR to the district court for York county: ARTHUR J. EVANS, JUDGE. *Affirmed.*

George B. France, for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown and *Meeker & Wray, contra.*

BARNES, J.

The state prosecuted John Blair in the district court for York county on a charge of statutory rape. The trial resulted in a conviction, and the court sentenced him to be confined in the state penitentiary for a period of three years. From such conviction and judgment the defendant brings error. The information contained three counts, in each of which the state attempted to charge the accused with the crime of statutory rape, committed on the person of one Beulah Thomas, who was alleged to be a female child under 18 years of age. In the first count the date of the alleged sexual intercourse was stated to be June 1, 1901; in the second count the time alleged was January 4, 1903, and in the third count the date named was February 5, 1903. Before going to trial the defendant filed a motion to require the state to elect on which count it would prosecute. The court, at that time, reserved his decision, but when the state had introduced its evidence in chief the motion was sustained, and the county attorney elected to rely for a conviction on the third count of the information.

Counsel for the defendant contended that the failure of the court to require an election before the trial commenced was reversible error. In some jurisdictions it is held that, where the indictment or information charges two or more distinct and separate felonies, the prosecutor

should be required to elect on which count or charge he will rely for a conviction, before going to trial. But most of the courts hold that a number of separate and distinct felonies, all of which may be tried in the same manner, which are of the same general character, which require for their proof evidence of the same kind, and the punishment for which is of the same nature, may be charged in separate counts of one information, and the party thus charged may be placed on trial on all of such counts at the same time; that the matter of requiring an election in such cases is left to the sound discretion of the trial court, to be exercised when the state has submitted its evidence in chief, and before the accused is put on his defense. This rule is sustained by the great weight of authority in this country. Maxwell, Criminal Procedure (2d ed.), 550, 551; Wharton, Criminal Pleading and Practice (9th ed.), secs. 295, 296; *Korth v. State,* 46 Neb. 631; *State v. Hodges,* 45 Kan. 389, 26 Pac. 676; *Roberts v. People,* 11 Colo. 213, 17 Pac. 637; *State v. Crimmins,* 31 Kan. 376; *State v. Schweiter,* 27 Kan. 499; *Commonwealth v. Jacobs,* 152 Mass. 276, 25 N. E. 463; *State v. King,* 114 Ia. 484, 91 N. W. 768; *Bailey v. State,* 4 Ohio St. 440.

We are firmly committed to the rule last above stated, and so it only remains for us to determine whether the court was guilty of an abuse of discretion in not requiring the prosecutor to elect on which count he would rely until after he had produced his evidence in chief. The record discloses that, although it was charged in the first count that the act of sexual intercourse took place on the 1st day of June, 1901, and in the second count that the offense therein described was committed on the 4th day of January, 1903, the state introduced no evidence establishing, or tending to establish, either of these counts. In fact, the record clearly shows that no attempt was made to prove the commission of any offense other than the one on which the state elected to rely for a conviction. This being the case, the fact that the state was not required

to elect, until after it had introduced its evidence in chief, resulted in no prejudice to any of the defendant's substantial rights. It therefore follows that the court was guilty of no abuse of discretion.

The defendant insists that the court erred in refusing to quash the second and third counts of the information; and also in overruling his motion to quash the third count after the state had introduced its evidence and rested. And it is contended that the state having charged in the first count that the offense described therein was committed on the 1st day of June, 1901, the second and third counts, in which the dates of the offenses charged were alleged as of January 4, and February 5, 1903, failed to state any offense, because, if the charge contained in the first count were true, the prosecutrix could not have been chaste at the times last above mentioned. In the first place, an examination of the first count shows that the facts alleged therein were not sufficient to constitute the crime of statutory rape. Therefore, it stated no offense, and, even if that count had stated an offense, it appears that the state had no proof, or at least offered none, to sustain it. For these reasons the allegations of the first count could in no way affect the charges contained in the other two. Again, when the state elected to rely on the third count for a conviction, the second count was as completely eliminated from the case as though it had never been set forth in the information. It follows that when the accused was required to present his defense the information, in legal effect, contained only the third count, and stood precisely as though it had never contained any other. That count was sufficient in form and substance to charge the offense of statutory rape, and on that count, and no other, the jury returned a verdict of guilty. Again, it was held in *Bailey v. State,* 57 Neb. 706, that the defendant cannot plead his own defilement of the girl within the statute of limitations as a defense to a later defilement. The court said:

"Had the first defilement of the girl by the prisoner

occurred in Nebraska instead of Iowa on the date it did, and which was prior to the one charged in the indictment, then the first defilement would be no defense to the prisoner on an indictment for the second, since both would have been within the statute of limitations and each intercourse a part of the crime charged in the indictment."

For these reasons it is apparent that the court did not err in overruling the defendant's motion to quash.

It is further contended that the court erred in overruling defendant's demurrer to the state's evidence. It is true that when the state first rested, the prosecutrix had, by her evidence, denied that the defendant had sexual intercourse with her at any time. But taking into consideration the testimony of her mother, in which she related the fact of having caught the defendant and her daughter in a compromising position in the barn on the 5th day of February, 1903, with other circumstances detailed by the witnesses, the conduct of the prosecutrix and the defendant toward each other, the fact of his having her taken from her own home in the night time, conveyed her to a neighbor's, taking her thence to his own house where he kept her concealed for more than a week, at a time when he knew she was wanted by the state as a witness against him in the prosecution of this case, together with her confessions to her mother, and others, as shown by the record, we cannot say that a conviction could not have been sustained, and that the case should not have been submitted to the jury. We think, however, this objection is eliminated because the case was reopened and other and further evidence introduced by the state.

Under the general head of errors of law occurring at the trial, many assignments are discussed by the defendant's counsel, and we will endeavor to dispose of them in the order in which they are presented.

Complaint is made because the prosecution was allowed to ask Miss Thomas certain questions relating to her evidence given at the preliminary hearing. For example: "Q. Do you remember the circumstances you testified to

on the preliminary examination as to what took place upstairs on that Sunday in June, 1901, between you and Blair?" The answer to this question, as shown by the record, was: "I do not remember. No, sir." It appears that all like questions were answered by her in the same way. It is apparent that the witness was at least a reluctant one, and for that reason the form of the questions was permissible. It further appears that no attempt was made to show what her evidence, or any part of it, was on the preliminary hearing, and, as the questions contained no recital of such evidence, it is not apparent to us how the examination complained of could in any way prejudice the defendant's rights.

Complaint is made of the admission of certain parts of the evidence describing defendant's conduct in removing the prosecutrix from her home in the night time and concealing her at his house, when he knew she was wanted as a witness by the prosecution. It is contended that this evidence could have no tendency to prove the crime alleged to have been committed on the 5th day of February, 1903, and only had a tendency to prejudice the rights of the defendant. We think counsel have failed to comprehend the purpose for which this evidence was introduced. It is true that it constituted no direct proof of the specific act charged against the defendant, but evidence of such conduct is always admissible because it is inconsistent with the innocence of the accused. "Evidence is relevant to show that the accused has threatened or assaulted a witness, has endeavored to prevail on him to abscond, has procured his absence, has endeavored to induce him to testify falsely." 12 Cyc. 398.

In *State v. Keith,* 47 Minn. 559, 50 N. W. 691, it was said:

"It is a prejudicial circumstance, which may weigh heavily against one accused of crime, that witnesses were by him sent out of the state and kept away, so that their testimony might not be produced against him."

We therefore hold that all of the testimony connecting

the defendant in any way with removing the prosecutrix from her home and concealing her whereabouts from the prosecution was relevant, and therefore properly received. The fact that this was done with the consent, and at the request, of the prosecutrix does not rob it of its incriminating character, and the exclusion of her evidence showing such request and consent was not reversible error.

Error is assigned for allowing the witness Beulah Thomas to answer certain questions on redirect examination touching the actions of the defendant and her own conduct during her absence from home from the 22d of November to the 7th day of December following. We have examined the record, and find nothing improper in these questions; and, as the defendant has not pointed out to us any particular reason for his statement that they were prejudicial to his rights, we are unable to say that the court erred in allowing them to be asked and answered.

It is contended that the court erred in receiving certain evidence given by Mrs. Thomas, the mother of the prosecutrix. A part of the evidence complained of related to statements made by the defendant to herself and husband, when he was charged by them with having sexual intercourse with their daughter in the barn on February 5, 1903. This evidence was clearly competent; but the gist of the complaint is that the witness stated that a certain letter written by the prosecutrix, which seemed to connect the defendant with the transaction, was read to him at that time, and he was asked what he had to say about it. No statement was made to the jury of the contents of the letter, and as it was not introduced in evidence the defendant could not have been prejudiced by the form of these questions. The rest of the testimony of this witness related to the conditions existing at the barn on the 5th day of February, 1903, what she saw there, and what took place between defendant and her daughter on that occasion. This evidence was clearly competent, and was properly received.

Error is predicated for receiving certain parts of the

testimony of S. A. Thomas, the father of the prosecutrix. That which is particularly complained of was his statement that he swore out a warrant for Blair's arrest, and went down there with the deputy sheriff after him. This evidence, it is claimed, had no tendency to prove the crime charged. In answer to this criticism it is sufficient to say that it was not offered for that purpose, but was offered in connection with the actions of the defendant in concealing the witness at a time when he knew her evidence was necessary in order to proceed with his trial.

It is contended that the court erred in receiving the evidence of Lewis H. Bice, as to the conversations he had with the defendant when employed by him to take the prosecutrix from her home to Anderson's, together with the conduct of the witness and the accused, and the conduct of the accused toward the prosecutrix from the 20th of November, 1903, until the trial of this cause in January, 1904. And it is urged that such testimony could have no tendency to prove the crime with which the defendant was charged. It is apparent that the evidence of Mr. Bice was introduced as an incriminating circumstance tending to prove the crime charged, and for the purpose of showing the conduct of the defendant in secreting the prosecuting witness. All of this testimony was competent for that purpose. It is also said that the jury might not believe that the defendant committed the crime on the 5th day of February, 1903, but that on account of this evidence they might believe that he committed the crime between the 26th of November and the 7th day of December of that year. It is a sufficient answer to this objection to say that there was nothing in the testimony of the witness Bice from which any one could even infer that sexual intercourse had taken place between the accused and the prosecutrix during the time covered by his evidence.

Objection is also made to the testimony of the witnesses Meredith, Newman, Dorsey, Wilcox, and others, relating to the conduct of the accused and the prosecutrix toward each other. As was said in *People v. Castro,* 133 Cal. 11,

65 Pac. 13, evidence of improper familiarity may be received to prove the adulterous disposition of the parties implicated. While it is true the evidence of these witnesses does not directly establish the commission of the crime charged, yet, from the conduct of the parties described thereby, the jury might conclude that it was not improbable that the act of sexual intercourse had taken place between them, as charged. Such testimony would at least tend to corroborate the evidence of the prosecutrix, and corroborating facts and circumstances are always admissible, and should be introduced in evidence when available.

Complaint is also made because the court excluded the evidence of Mrs. Blair and others, offered for the purpose of showing that the prosecutrix had said to them, while she was concealed at the defendant's house, and at other times and places, that the accused had never wronged her, or misused her in any way, and the reason she did not go home was because her parents were trying to compel her to testify that she had criminal relations with the defendant; that such testimony was false, and that they threatened to punish her for not testifying as they wanted her to, which was to testify to that which was false. When this evidence was offered it was clearly incompetent. The prosecutrix had testified positively that the accused had never had sexual intercourse with her. The testimony offered in no manner tended to dispute her evidence. Therefore it was not competent, when offered, for any purpose. Again, it was hearsay evidence, and amounted, at that time, to nothing more than an attempt to corroborate the evidence of the prosecutrix by her own declarations.

It is further contended that the court erred in permitting counsel to ask the prosecutrix the questions which were propounded to her at the time she was recalled and testified as to the act of sexual intercourse between herself and the defendant on the 5th day of February, 1903, because they were unfair, unreasonable and leading, and,

in fact, suggested to the witness the answers desired. The only criticism which can be truthfully directed against this form of examination is that it was somewhat leading. We have often held that, where the witness clearly appears to be hostile or reluctant in giving testimony, the court in his discretion may permit the prosecution to propound leading questions. It is apparent from the record that the prosecutrix was not only a hostile witness, but also a most reluctant one. This no doubt because of her reluctance to publish her own shame. Therefore leading questions were proper and necessary in this case, and the court rightly so held.

We come now to the question of defendant's request for a continuance of the case, after the prosecutrix was recalled, to enable him to procure the attendance of witnesses to prove that she had told them at different times and places that the defendant had never had sexual intercourse with her at any time, had always treated her well, and never injured her in any way. This application for a continuance was overruled by the court, because it appeared that a large number of the witnesses desired for the purpose above mentioned were present in the court room, and if there were any other witnesses desired for that purpose their testimony would be merely cumulative; that there was no sufficient foundation laid, or showing made, for a continuance of the case. It appears from the record that James Carey, Ira Blair, James Oram, John Walsh, Mary Blair, A. B. Taylor and John Blair were called as witnesses for the purpose above mentioned; that they were all present in court, and testified to the fact that the prosecutrix had told them, at different times and places, that the defendant had always treated her well; had never injured her in any way, and had never had sexual intercourse with her at any time. Only three witnesses of all those subpœnaed by the defendant were absent and failed to testify on that point. When we take into consideration the statement of the prosecutrix that she did not remember whether she made those declarations to the

three absent witnesses, and further consider the fact that their evidence, if produced, would have been merely cumulative, we are constrained to hold that the denial of a continuance in no manner prejudiced the defendant's rights.

It is strenuously contended that the court erred in permitting the state to withdraw its rest after a part of the arguments were made, and recall the prosecutrix for further examination. That this is a matter committed to the sound discretion of the trial court there can be no question. *McClellan v. Hein,* 56 Neb. 600; *Hans v. State,* 50 Neb. 150; *Sieber v. Weiden,* 17 Neb. 582; *Gillette v. Morrison,* 9 Neb. 395; *Tomer v. Densmore,* 8 Neb. 384; *Chicago, B. & Q. R. Co. v. Goracke,* 32 Neb. 90; *Pence v. Uhl,* 11 Neb. 320.

In *Fremont, E. & M. V. R. Co. v. Crum,* 30 Neb. 78, the court said:

"It appears from the bill of exceptions that after the closing of the evidence, and the counsel on either side had addressed the jury, the counsel for defendant asked the court to instruct the jury to find for the defendant, on the ground that the plaintiff had not shown by the evidence that any one of the three fires alleged were upon the land described in the petition. Thereupon counsel for the plaintiff moved to reopen the case, to which defendant objected, and counsel stated that he would be unable to proceed with the trial if the case was then opened; which objection was overruled, the case was reopened and the plaintiff allowed to re-examine witnesses as to the locality of the railroad and that of the burned premises. * * * We see no reversible error in the action of the court; but it is not doubtful that it was within the discretion of the court, and tended to the impartial administration of justice and to the economy of litigation."

In *Yeoman v. State,* 21 Neb. 171, the court said:

"After the introduction of other witnesses the defense rested. The district attorney then recalled Amanda Yeoman 'for the purpose of cross-examination.' To this plaintiff in error at the time objected, but the objection was

overruled, to which he excepted, and now assigns the ruling for error. We are not informed whether there was any showing made upon the part of the state or not, but for the purposes of this case we will assume there was not; and yet we do not think there was such an abuse of discretion, if any, on the part of the court as to call for a reversal of the judgment on that ground. A certain reasonable discretion is allowed to the trial court in the conduct of the trial before it, and so long as it is not clear that that discretion has been abused to the prejudice of the party complaining, the action of the trial court will be upheld. In the matter now under consideration we can detect neither abuse of discretion nor prejudice to plaintiff in error."

It appears in the case at bar that after both parties had rested and the arguments had begun, the prosecutrix, of her own accord, sent word to the presiding judge that she desired to correct some misstatements in her former testimony; that she informed the sheriff, in whose custody she had been placed, of such desire; that she sent word to the county attorney that she wished to see him, and informed him, when he called upon her, that she desired to correct her former testimony. The nature of the proposed correction was imparted to the court, and it was clearly shown that she, using her own words, proposed to tell the truth about the matter in controversy. Under these circumstances it was proper for the court to reopen the case and receive her testimony. Refusal to have done so would have been an arbitrary exercise of his discretionary power, and would have resulted in a miscarriage of justice. After the prosecutrix had corrected her former evidence, the trial proceeded the same as though she had given such corrected testimony in the first instance. The defendant was then permitted to complete his defense, and in doing so introduced the evidence of the seven witnesees heretofore named, showing that the prosecutrix had, at other times and places, made statements contrary to her corrected evidence. The defendant was deprived of no substantial ele-

ment of his defense, and was at no time in any worse position than he would have been had her testimony, as corrected, been delivered when she was first called to the witness stand. The record discloses neither an abuse of discretion nor prejudice to the defendant.

Complaint is made because the court overruled the defendant's objection to the appearance of counsel, alleged to have been retained by private parties, to aid in conducting the prosecution. It is the common practice in this state to permit such counsel to appear whenever a request is made therefor. *Polin v. State,* 14 Neb. 540; *Bradshaw v. State,* 17 Neb. 147; *Gandy v. State,* 27 Neb. 707. It is stated, however, that the county attorney did not request the appointment of private counsel to assist him, and the court did not appoint the counsel for that purpose. On that question the record is silent. However, the fact that private counsel assisted the county attorney in the prosecution, with his entire sanction, raises a strong presumption of request and appointment. Again, the objection of the defendant to the appearance of such counsel was not made at the proper time, nor in an available manner. It appears that during the examination of the prosecutrix the objection was made, and the record on that question is as follows: "Q. I will ask you, Miss Thomas, if you were ever upstairs in this sleeping room when Mr. Blair came up there where you were, at any time in the year 1901 or 1902? Objected to. Incompetent. Immaterial. No evidence on the matter of her going upstairs; no foundation laid for question, and leading. Overruled. Defendant excepts. It is objected to attorneys Mr. Merton Meeker, Arthur G. Wray and Mr. Frederick C. Power, and each of them, appearing on the part of the state to prosecute this case, as the county attorney is here in his official capacity, able and ready to take part in the prosecution. Overruled. Defendant excepts." This was the only objection interposed to the appearance of such counsel. It will be observed that the objection was made during the trial, and in connection

with an objection to a question propounded to the prosecuting witness. No statement was made, or evidence offered, showing, or tending to show, that the prosecution had not requested the assistance of counsel, or that the court had not properly appointed them to render such assistance. Again, it is not apparent from an examination of the record that the part taken by assistant counsel in the prosecution of this case tended in any manner to prejudice the defendant's rights.

It is urged that the district court erred in giving instruction No. 6, which reads as follows: "6. The jury are instructed that the material allegations of the information upon which the defendant is prosecuted in this case are as follows: First. That the defendant John Blair, at the time of the intercourse with which he stands charged in the information, was a male person over the age of 18 years. Second. That said Beulah Thomas, at the time of the intercourse with which the prisoner stands charged in the information, was a female child under the age of 18 years. Third. That on or about the 5th day of February, 1903, and within three years prior to the 9th of January, 1904, the said defendant made an assault upon said Beulah Thomas, and did carnally know and abuse her. Fourth. That said Beulah Thomas, at the time of the intercourse with which the prisoner stands charged in the information, was chaste, as defined in these instructions. Fifth. That the crime charged in the information was committed in York county, and state of Nebraska, and since the 9th day of January, 1901, and prior to the 25th day of April, 1903."

The contention is that this instruction was erroneous and prejudicial to the rights of the defendant, in that it permitted the jury to find the defendant guilty of a crime of the character alleged in the information at any time up to and including the 9th day of January, 1904. Reading the several paragraphs of this instruction together, and giving the whole a fair construction, it is apparent that the jury could not have been misled thereby. Again, it is clearly and explicitly stated in the fifth subdivision

or paragraph that the jury must find that the crime charged in the information was committed in the county of York, and state of Nebraska, since the 9th day of January, 1901, and prior to the 25th day of April, 1903, which was the day on which the prosecution was begun. In considering the probable effect of this instruction, we must remember that there was no evidence before the jury of any act of sexual intercouse between the defendant and the prosecutrix except the one alleged to have occurred on the 5th day of February, 1903, which was within the dates above mentioned. That was the only act of sexual intercourse which the jury could have considered at all, and was the one for which the defendant was convicted. It follows that the instruction complained of was not misleading, and the defendant's criticism is untenable. *Ferguson v. State,* 52 Neb. 432; *Rema v. State,* 52 Neb. 375; *Palin v. State,* 38 Neb. 862.

Lastly, it is contended that the verdict of the jury and the judgment of the court are not sustained by sufficient evidence. It is impossible within the limits of this opinion to quote or even epitomize the evidence. It clearly appears that the prosecutrix, at the time of the alleged sexual intercourse, was a female child not quite 16 years of age; that the defendant was a male person over 18 years old; that the prosecutrix testified that she never had sexual intercourse with any man other than the defendant, and her evidence on that point being undisputed was sufficient to show her previous chastity. It further appears that she testified positively that the act of sexual intercourse took place between herself and the defendant on the 5th day of February, 1903, in the barn on her father's premises in York county, Nebraska. It also appears that her mother, at the time and place of this occurrence, saw her and the defendant in a compromising position; that for this reason her suspicions were aroused, and her belief in the rumors that had been going about the neighborhood of improper intimacy between the defendant and her daughter was confirmed. That when charged with such improper in-

timacy, the prosecutrix at first denied it, but afterwards admitted it to her mother. There was also evidence of acts of unusual intimacy between the prosecutrix and the defendant extending over a period of about two years; and while none of such acts were in themselves sufficient to establish the fact of sexual intercourse, yet, as above stated, they were proper to be considered, as showing the adulterous disposition of the prosecutrix and the defendant toward each other. The foregoing facts, and the circumstances surrounding the transaction in question, together with the conduct of the defendant, in removing the prosecutrix, about the time that his trial was coming on, from her home to Anderson's, in bringing her from Anderson's to his own home, where he kept her concealed from the 26th day of November to the 7th day of December, following, and only disclosed her whereabouts when charged with having her concealed in his house, and confronted with a warrant for his arrest therefor (conduct hardly consistent with his innocence), prevent us from saying that the evidence was not sufficient to support the verdict, and the jury was not justified in finding the defendant guilty, as charged in the information. While it is true that the prosecutrix made different and conflicting statements on the witness stand, and elsewhere, yet, after all, the jury was the proper tribunal to determine the weight and credibility of her evidence, considered in the light of all of the other testimony, together with the incriminating conduct of the accused, and we are unable to say that the conclusion arrived at by that body was incorrect.

A careful review of the entire record discloses no reversible error, and therefore the judgment of the district court is

AFFIRMED.

AACHEN & MUNICH FIRE INSURANCE COMPANY, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

FILED OCTOBER 20, 1904. No. 13,824.

1. **Taxation**: FOREIGN INSURANCE COMPANIES. Under the first clause of section 1, article IX of the constitution of this state, which enacts, "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises," property and franchises within the state must be taxed according to valuation, and no discrimination can be made between foreign or domestic fire insurance companies as to taxes laid under this subdivision.

2. ———: CONSTITUTIONAL LAW. A tax upon the gross amount of premiums received by a foreign fire insurance company during the preceding year within the county, town, city, village and school district where the agent conducts the business is not a tax upon property required to be laid under the first clause of section 1, article IX of the constitution, but is a tax upon insurance interests or business, and is authorized by the second subdivision of said section. *Phœnix Ins. Co. v. City of Omaha*, 23 Neb. 312, distinguished.

3. ———: ———. Under the second clause of said section, providing for the taxation of persons because of the businesses or occupations in which they shall be engaged, a tax possesses the requisite character of uniformity if the persons subject to it are duly divided into classes, and the law operates on the members of each class uniformly under substantially the same circumstances and conditions.

4. ———: ———. Section 6 of article IX of the constitution provides affirmatively that taxes on persons for corporate purposes shall be levied by municipal authorities under powers vested in them by the legislature for that purpose, and by section 7 of that article the legislature is forbidden to levy taxes upon persons or property for the corporate uses of municipal corporations. That which is forbidden to be done directly cannot lawfully be done by indirection.

5. ———: ———. For the purposes of taxation under either section 1 or section 6, article IX of the constitution, insurance companies not organized under the laws of this state may be treated as a single class, and taxed at a rate different from that imposed upon such corporations that are so organized.

6. ———: ———. Section 7, article IX of the constitution, prohibits the legislature from imposing taxes on municipal or other corporations, or the inhabitants or property thereof, for corporate purposes. *Held*, That the tax sought to be imposed upon the appellant fire insurance company was attempted to be imposed under the direct authority of the legislature, and is in conflict with the provisions of said section. *State v. Wheeler*, 33 Neb. 563, followed.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

Greene, Breckenridge & Kinsler, for appellant.

C. C. Wright and *W. H. Herdman, contra.*

BY THE COMMISSION.

This is a proceeding in error from a judgment of the district court for Douglas county sustaining a general demurrer to the petition and dismissing the action. The action was brought by the Aachen & Munich Fire Insurance Company, a foreign corporation, for the purpose of restraining the city of Omaha and August H. Hennings, the city treasurer, from enforcing and collecting a tax which was assessed for municipal purposes by the tax commissioner of that city upon the gross premium receipts within the city of Omaha of the plaintiff for the preceding calendar year, under section 58 of the revenue law (article I, chapter 77, Compiled Statutes, 1903; Annotated Statutes, 10457). The grounds upon which the plaintiff seeks to declare the tax void are as follows: Discrimination between fire insurance companies organized under the laws of other states or countries and domestic fire insurance corporations; also discrimination between foreign life, accident and surety companies and foreign fire insurance companies; and further, that section 58, which provides for the assessment and taxation as property of the gross premium receipts during the preceding year of foreign fire insurance companies, is void because it lays a property tax on incomes for a previous year without regard

to the actual existence in the state of any taxable property. That section 58 is void by reason of the discriminations, privileges and immunities in sections 59, 60 and 61 in favor of other insurance companies; and that the act is broader than its title.

In the brief of plaintiff and in the oral argument our attention has mainly been directed to the following propositions: First, that the tax is void because it is a tax on money not within the jurisdiction of the state or taxing districts at the time it was levied. Second, that section 58 of the revenue law, under which the tax commissioner and the city treasurer of Omaha are seeking to proceed, authorizes all taxing districts within the state to assess and tax the gross receipts of foreign fire insurance as items of property, the same as property and franchises are assessed and taxed under the provisions of the first clause of section 1, article IX of the constitution, and is therefore void. Third, the tax is void because section 58 authorizes the taxing districts mentioned therein to impose a larger burden upon the property of foreign fire insurance than it authorizes them to impose upon the property of other insurance companies doing business in this state, and, in this respect, provides for an unjust and arbitrary discrimination upon the property of foreign companies for the purpose of taxation. Fourth, that section 58 does not operate uniformly upon all insurance companies which are members of the same class within the meaning of the constitution.

The question which lies at the very threshold of the investigation in this case is under which, if either, of the two clauses of section 1, article IX of the constitution, can such a tax as this be upheld? Section 1, article IX of the constitution of the state of Nebraska, is as follows: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct,

and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates." By the first clause of this section it is directed that "the legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct." A tax laid under this subdivision is imperatively required to be levied by valuation, so that the tax shall be in proportion to the value of "property and franchises." Under these provisions there can be no discrimination between persons or classes. Every person and every corporation must be taxed alike by valuation. The law knows no distinction between persons or corporations, or between foreign or domestic corporations, under the powers granted by this clause. This court said, by SULLIVAN, C. J., in *State v. Fleming,* 70 Neb. 523, in speaking of foreign insurance corporations:

"Such companies have no authority to transact business in this state without the consent of the state, and, when they seek the privilege, they must comply with the conditions imposed. After coming here, their property must be dealt with on terms of equality with the property of the citizen. It is subject to no further burden in the way of taxation than is imposed upon the resident, but, for the privilege of doing business here, they must submit to such conditions as the legislature sees fit to impose."

The legislature has no power to impose a tax by valuation upon the property of foreign fire insurance companies within this state, and at the same time exempt domestic fire insurance companies from a like burden. If such a discrimination were made, it could not be upheld. If the tax of which complaint is made in this case, there-

fore, is a tax upon property, there is a manifest discrimination made between the property of foreign and domestic fire insurance companies. But is it a tax upon property? Under the facts stated in the petition and admitted by the demurrer, much the greater part of the money received for premiums during the preceding calendar year was not in the state when the assessment was made. The money received for premiums had been sent out of the state, and only a small amount was actually within manual reach of the taxing officers. It is an elementary proposition that the state has power to tax all property within its limits, but it cannot reach outside and lay its hands on the property of nonresidents not within its sovereignty. *Clother v. Maher,* 15 Neb. 1; *Finch v. York County,* 19 Neb. 50; Judson, Taxation, secs. 391, 431. The theory of taxation is that each individual shall contribute to the state a fair proportion of his substance within its limits in return for the protection to his person and his property afforded him while within its jurisdiction. This excludes the idea of tangible property lying within the confines of another state which belongs to residents of the foreign state, and which may properly be and usually is taxed for the support of the government of that state, being subject to taxation in this state. The general rule is that the domicile of the owner is the *situs* of personal property for the purpose of taxation. This rule has its exceptions, and the legislature has the power, where personal property is actually within this state, to separate it from the domicile of a nonresident owner for the purpose of taxation. When, however, both the residence of the owner and his tangible personal property are outside of the limits of the state, no power exists in the legislature to make such property a subject of taxation.

It is strongly urged by the plaintiff that the language of the law reciting that such gross receipts are "to be taken as an item of property of that value, to be assessed and taxed on the same percentage of such value as other property," clearly and irrefutably shows that the tax is a tax upon

property and therefore void. But we think we are not driven to this conclusion, and that the language, "to be taken as an item of property of that value," may be reasonably construed as a direction to the assessing officer as to how it is to be listed in his schedules, and is not an authoritative declaration and classification of the tax as a property tax. Even if it were such a declaration, the fact that the legislature called that a property tax which was not a property tax, and that the name was a misnomer, would not invalidate the tax if it were otherwise valid as a proper exercise of the taxing power under the authority conferred by the constitution. It is never presumed that the legislature enacted a law with the intention of violating the constitution, and it is a sound rule that if two reasonable constructions of a statute may be made, one of which will not violate the organic law while the other will, that construction is to be preferred which is in accordance with constitutional provisions. The tax in question is not a license tax imposed upon this corporation as a condition precedent to being allowed to do business in this state; no element of police power enters into it; its purpose is merely to raise revenue; it is a tax upon the business of transacting fire insurance by a class of fire insurance companies who are incorporated in other states and foreign countries. It is not a property tax, but it is a tax on insurance interests which is a business tax, and is not authorized by the first subdivision of section 1, article IX of the constitution.

It is true that in the case of *Phœnix Ins. Co. v. City of Omaha*, 23 Neb. 312, the gross premiums received by every insurance company, other than mutual companies without capital stock within this state, during the year previous to the year of listing in the county where the agent conducts the business, were held to be assessable and taxable as personal property in the hands of such agent. But in that case it is said by Justice COBB:

"I do not understand the plaintiff in error to raise a question as to the constitutionality of the revenue law

(chapter 77, Compiled Statutes, 1887), as a whole, or of any section or provision of it. Its contention is, that the earned premiums of insurance companies of the class to which it belongs are not among the subjects of taxation within its provisions; and secondly, if they are classed among the subjects of taxation by state and county authorities, yet, that cities have not been vested with authority to tax them for municipal purposes."

The court, therefore, in that case only passed upon these questions, and the constitutionality of the provisions of the law was not considered. The case, therefore, is readily distinguishable from the case at bar, where the issue of constitutionality is distinctly raised. That case merely construed the statute, while the instant case attacks the validity of the enactment itself. We are not bound, therefore, by the holding in that case that such premiums were assessable and taxable as property.

We shall next inquire whether authority to impose such a tax is conferred by the second clause or subdivision of section 1, article IX of the constitution, which is as follows: "It" (the legislature) "shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates." We have already seen that the tax is not a property tax laid by valuation, but is a tax upon business. A tax upon "insurance interests or business" is expressly authorized by this subdivision, so that, if the tax complies with the further requirement of uniformity as to the class upon which it operates, it may be upheld as a valid exercise of taxing power. By section 58, foreign fire insurance companies are placed in a class by themselves, and it is argued by the plaintiff that the effect of this action, in thus segregating foreign fire insurance companies from other fire insurance companies, is to unjustly and arbitrarily discriminate against them as between

themselves and all other insurance companies, and that the tax is not "uniform as to class." If, as is contended by the counsel for plaintiff, all insurance companies necessarily belong in the same class for taxing purposes, there can be no escape from the conclusion which they draw; but is there not such a difference in conditions, manner of doing business, place of organization, disposition of premium receipts, and other matters, as to justify the division or classification made between foreign and domestic companies doing fire insurance business? A classification to be valid must not be arbitrary. It must rest upon some real distinction, and unless it does so it cannot be upheld. *Rosenbloom v. State,* 64 Neb. 342. There is a real distinction, and not an artificial or arbitrary one, between a domestic and foreign corporation of this nature which is clear and obvious. In *Hughes v. City of Cairo,* 92 Ill. 339, the constitutionality of a statute which authorized the cities and villages of the state of Illinois to impose a tax upon the premium receipts of foreign insurance companies doing business within their respective limits was assailed, but the court upheld the imposition levied as a valid exercise of the power of taxation. With reference to classification for the purposes of taxation the court say:

"The error of the position taken consists in assuming that all insurance companies, whether foreign or domestic, constitute a single class, indivisible, for taxation, under this section of the constitution. This is a mistaken view of the law. There is and can be no reason why insurance companies may not be divided into classes, consisting of foreign and domestic companies, and burdens imposed on the former that are not imposed by any general law on the latter class, without an infraction of any provision of the constitution. In *Ducat v. City of Chicago,* 48 Ill. 172, this court recognized the fact such distinctions might be taken under that clause of the 5th section of article IX of the constitution of 1848 that required all taxes imposed by municipalities 'to be uniform

in respect to persons and property within the jurisdiction of the body imposing the same.' The principle of that case is conclusive of the one at bar."

In the absence of constitutional restraints, the power of the legislature over taxation is as unlimited as the subject with which it deals. In our constitution, that power is restrained in two particulars only, namely, taxes upon property and franchises are required to be levied in proportion to value, and taxes upon persons or occupations are to be uniform with respect to the classes affected by them, but the legislature is left with a free hand in the matter of classification, and as to what classes shall be taxed and what exempt, and as to the gravity of the burden imposed upon the former. It is only required that such taxes for general state revenue purposes shall be levied in accordance with a uniform rule, and that those levied by municipal corporations shall be imposed by corporate authorities in the exercise of powers conferred upon them by the legislature. As is said in 2 Cooley, Taxation (3d ed.), 1094:

"It has been seen that the sovereignty may, in the discretion of its legislature, levy a tax on every species of property within its jurisdiction, or, on the other hand, that it may select any particular species of property, and tax that only, if in the opinion of the legislature that course will be wiser. And what is true of property is true of privileges and occupations also; the state may tax all, or it may select for taxation certain classes and leave the others untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by constitution."

In consonance with this principle, the supreme court of Kansas in *Phœnix Ins. Co. v. Welch*, 29 Kan. 672, speaking by Mr. Justice Brewer, say:

"It matters not whether this charge upon the plaintiff is to be regarded in the nature of taxation or a license. In neither case is it justly obnoxious to the charge of inequal-

ity in the sense that would make it unconstitutional. The legislature may classify for the purposes of taxation or license, and when the classification is in its nature not arbitrary, but just and fair, there can be no constitutional objection to it. Thus, within the state municipalities are classified by population, and the authorized rate of taxation is, or may be, very different in each. Here foreign insurance corporations are classified by the states from which they come, and when we consider the purposes of such classification it cannot be held that there is anything arbitrary or unjust therein." To the same effect are *Scottish Union and National Ins. Co. v. Herriott,* 109 Ia. 606, 80 N. W. 665; *City of Dubuque v. Northwestern Life Ins. Co.,* 29 Ia. 9; *State v. Insurance Company of North America,* 115 Ind. 257, 17 N. E. 574. We are of opinion, therefore, that the conclusion reached by this court in *State v. Fleming,* 70 Neb. 523, upholding the separate classification and special discriminating taxation of foreign insurance companies, is right and ought to be adhered to, and we are of opinion that abundant justification therefor is found in the revenue clauses of the constitution and in judicial opinions. *Hughes v. City of Cairo,* and *Ducat v. City of Chicago, supra.*

It is further argued that the tax does not act uniformly upon all insurance companies which are members of the same class, and is therefore void. With this contention we cannot agree. Mr. Cooley in his work on Taxation (Vol. 1, 3d ed., p. 261), in discussing the requirement of uniformity, states that a business tax may be a sum whose amount is regulated by the business done or income or profits earned, and further, "If a state, for example, were to decide to levy an occupation tax upon one of the learned professions, it might decide to lay the same tax upon each member, or it might discriminate so that the tax should be proportioned to the professional income. Either course would be admissible provided the rule were made general." It is said in *Worth v. Wilmington & W. R. Co.,* 89 N. Car. 291:

"The governing principle is not that the same specific tax shall be paid by each, as a form of capitation tax, but that, whether levied upon and measured by the amount of gross or net earnings or other standard, as upon real or personal estate, there shall be no discrimination made among individuals of a class, based upon privileges and immunities secured to one under contract and not to another."

The constitution of California requires that taxation shall be equal and uniform, but it was held in *City and County of Sacramento v. Crocker*, 16 Cal. 119, that the requirement of uniformity was not violated by a tax upon business graduated by the amount of sales. In *Templeton v. Tekamah*, 32 Neb. 542, an ordinance was held valid which levied the sum of $10 upon each person, firm, association or corporation, keeping or using any stallion or jack for breeding purposes within the corporate limits of Tekamah. See also *Magneau v. City of Fremont*, 30 Neb. 843. A business or occupation tax levied by a municipal corporation, which bases the amount of the tax according to the number of pool tables used, or the quantity of any mercantile commodity sold, or upon the amount of the gross receipts of a street railroad, gas or electric light company, or the gross premiums received by an insurance company, complies with the rule of uniformity with respect to persons, and is not violative of the constitution in that respect. If the burden is equal as to all in the same occupation under the same conditions, it is uniform as to persons. *Roscnbloom v. State, supra.*

The plaintiff further contends that, since each member of the class is required to pay a tax proportionate to its annual gross receipts, and since the rate of taxation may be and usually is different in the various local taxing districts, the tax is not uniform by reason of this variability, and that therefore it violates the constitutional rule of uniformity and the section is consequently void. We cannot accept this conclusion. Much the larger part of the most important powers and duties of the state have

to do with the administration of law in its political subdivisions, like counties, towns and school districts. Diversities of circumstances among such localities occasion difference in the amount of expenditure requisite for the administration of the same general laws in all of them. Not necessarily, but as a matter of convenience and justice, the state distributes the burdens of taxation in proportion to the differences of expenditure, and commits the administration of the laws relative thereto to local administrative boards and officers, but the powers and duties in these respects which the latter perform are not the less, on that account, the exercise of the functions of state government. The variability of which the plaintiff complains is therefore one which arises from the operation of uniform laws, and is due only to difference in the local circumstances to which they have application. If a company is taxed more in one county, township, or school district than it would be in another, it is not because of the want of uniformity in the operation of the law, but because it chooses to transact its business in the former locality rather than in the latter. To borrow a phrase from the interstate commerce law, all the companies are subjected to the same burdens under substantially the same circumstances and conditions.

Counsel for the city attempts to uphold the tax by saying that section 58 defines the annual gross premiums of an insurance company as property, and assesses their value for the purpose of taxation at their aggregate amount, and thus brings them within the operation of the clauses of the city charter which authorize levies for municipal revenue purposes upon all taxable property within the corporate limits. Counsel for the plaintiff argue that, for this very reason, the section is wholly void as attempting to levy as a tax by valuation under the first clause of section 1, article IX of the constitution, what could only be imposed as a tax upon persons under the second clause of that section. We are unable to agree with either contention. Section 12 (Annotated Statutes, 10411)

of the revenue law provides that property "shall be valued at its actual value which shall be entered opposite each item and shall be assessed at twenty per cent. of such actual value." If the gross annual premium receipts of an insurance company are entered upon the lists, the company will be compelled to pay upon them the same percentage which is exacted for general state purposes upon the actual value of taxable property in the locality in which its business is carried on. As we have already attempted to show, such an exaction would not violate the rule of uniformity prescribed by the second clause of section 1, article IX of the constitution, and it may therefore be upheld as an exercise of the power conferred by that section, although the legislature, perhaps, had not that clause in view when they framed and adopted the act.

Lastly, it is further urged that the tax is void because it is an attempt of the legislature to levy a tax for municipal purposes directly. Section 7, article IX of the constitution, provides as follows: "Private property shall not be liable to be taken or sold for the payment of the corporate debts of municipal corporations. The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes." It is admitted by the demurrer that the assessment complained of was made by the tax commissioner of the city of Omaha for municipal purposes only. The power to tax is inherent in the legislature. It may, under the authorization of section 6, article IX of the constitution, which is as follows: "The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same"—vest municipal corporations with authority to assess and collect taxes for corporate purposes, but, unless such au-

thority has been expressly delegated to the municipal authorities by an act of the legislature, the power to impose the same does not vest in the municipality. This proposition is so elementary that the mere statement of it is all that is necessary. In the recent case of *State Board of Tax Commissioners v. Holliday,* 150 Ind. 216, 49 N. E. 14, cited and followed in *Hart v. Smith,* 159 Ind. 182, 64 N. E. 661, the principle is stated as follows:

"The power of taxation is a sovereign power and belongs exclusively to the legislative department of the government. * * * Where the legislature has not exercised this power, no other department of the state government can supply the omission; and where no such regulation has been prescribed by law as to any particular species of property, then such property cannot be taxed."

Legislative acts under which the authority to impose taxes is asserted are to be strictly construed. *People v. Chicago & A. R. Co.,* 194 Ill. 51, 61 N. E. 1064; *State v. Irey,* 42 Neb. 186. The defendants rely upon section 58 of the revenue law as their authority for the imposition of the tax, but if this is the only authority they have, then they are attempting to enforce a tax for municipal purposes imposed by the legislature directly upon the property within a municipal corporation for corporate purposes. By section 7, article IX of the constitution, the legislature is forbidden to impose taxes upon municipal corporations, or upon the inhabitants or property thereof, for corporate purposes.

In *State v. Wheeler,* 33 Neb. 563, the defendant in error was informed against for the violation of a law which required the payment to two per cent. of the gross premium receipts of foreign fire insurance companies within cities and villages as a duty or rate for the support of fire companies. It was contended upon behalf of the state that it was not a tax but a license fee imposed as a condition precedent to doing business, but this court held the exaction was not a license fee but a tax, and therefore violated the constitutional provisions inhibit-

ing the imposition of a tax by the legislature upon the inhabitants or property of municipal corporations for corporate purposes.

In *Lincoln Street R. Co. v. City of Lincoln,* 61 Neb. 109, 139, this court say:

"This section has received consideration from this court in *State v. Wheeler,* 33 Neb. 563, and *German-American Fire Ins. Co. v. City of Minden,* 51 Neb. 870. Speaking with reference to the first case, it is said in the latter: 'It is quite evident that it (the act considered in the first case) was held bad because it was an attempt by the legislature, not to empower municipal corporations to impose a tax for corporate purposes, but to impose by the legislature itself a tax for corporate purposes on the inhabitants and property of the municipal corporation, this being forbidden by section 7, article IX of the constitution.' If, then, the legislation now objected to is, in effect, the imposition of a tax by the legislature itself on the property of the defendant, and not an authority to the city to do it, the act would be void." *City & County of San Francisco v. Liverpool and London and Globe Ins. Co.,* 74 Cal. 113, 15 Pac. 380.

We are of opinion that the levy of taxes complained of in this action is void because the assessment was not made pursuant to any ordinance or authority of the city of Omaha, but under the supposed direct authority of section 58 of the revenue law, and therefore was a violation of section 6 and section 7 of article IX of the constitution.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, APPELLEE, V. CITY OF OMAHA ET AL., APPELLANTS.

FILED OCTOBER 20, 1904. No. 13,825.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

C. C. Wright and *W. H. Herdman,* for appellants.

J. J. Sullivan and *Greene, Breckenridge & Kinsler, contra.*

BY THE COMMISSION.

This case differs from that of *Aachen & Munich Fire Ins. Co. v. City of Omaha, ante,* p. 518, only in the kind of insurance appellee writes. The decision in that case is decisive of this also. It is therefore recommended that the judgment of the district court be affirmed.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

JANE C. SIMMONS, APPELLANT, V. LURINDA KELSEY ET AL., APPELLEES.

FILED OCTOBER 20, 1904. No. 13,626.

Abatement. Section 45 of the code expressly enacts that an action shall not abate by reason of the disability of a party happening during its pendency. In such cases a duty devolves upon the court to take such steps as shall become necessary to protect and preserve the rights of the incapacitated party.

APPEAL from the district court for Johnson county: JOHN S. STULL, JUDGE. *Reversed.*

S. P. Davidson, for appellant.

E. B. Quackenbush, Ed M. Tracy, Hugh La Master and *J. C. Moore, contra.*

AMES, C.

The plaintiff, a woman nearly 80 years old, entered into a written agreement with the defendants, her heirs at law, for the immediate distribution of her estate among them. There was no consideration moving to her, and she was admittedly lacking in full contractual capacity, and there is evidence that she yielded to united and persistent importunity by the heirs. All parties are agreed that for one reason or another the agreement was and is wholly void, but it has been in large part carried into execution. The object of this action is to procure its cancelation, in so far as it remains unexecuted, and to obtain and retain for the plaintiff undisputed possession and enjoyment of the undistributed portion of her estate.

The defendants, among other defenses, pleaded in abatement that the plaintiff was of insufficient mental capacity to manage or control her own affairs or to begin and prosecute the action, and all parties pleaded her incapacity to make the alleged contract in controversy. The court by final decree found that the plaintiff "is and was for a

long time prior to the commencement of this action an incompetent person, and at the time of the commencement of this action was incapable and incompetent to have charge, direction and management of her own property and business." Just what was meant by this finding is difficult to be understood. It was not followed by its logical consequence, the abatement of the action or an order suspending proceedings to await the appointment and appearance of a guardian, but was succeeded by a general finding in favor of all the defendants, except as to a particular tract of land which had been conveyed to one of them, and concerning which no specific adjudication was made, and by a decree dismissing the action generally, not without prejudice but as upon its merits, thus in practical effect affirming a transaction which, as we have said, all the parties united in denouncing as void. The plaintiff appealed, and a reversal of the judgment appears to us to be a matter of course. Whatever may have been the mental capacity of the plaintiff at the time she signed the agreement, there can be no doubt that that document was void for want of consideration and because it was extorted by means of undue influence amounting to a kind of duress *per minas*. If she subsequently became demented, as the court perhaps intended to find, that fact did not justify the remaining findings or the decree. Mental imbecility is not a ground for the judicial forfeiture of the rights or estate of a person afflicted thereby. But such examination of the record, which is quite voluminous, as we have been able to make, convinces us that the plaintiff was, at the beginning of the action and at the time of the trial, of sufficient understanding to decide rationally upon taking that step and upon prosecuting the suit with a view to preserving to herself sufficient of her property for her maintenance during the remainder of her life. Section 45 of the code expressly enacts that an action shall not abate by reason of the disability of a party happening during its pendency. If before the termination of the litigation she shall become incapaci-

tated, a duty will devolve upon the court, as the general conservator of the estates of all persons under disabilities, to see to it that her rights and estate are protected and preserved, either by a general guardian or by a next friend or guardian *ad litem* appointed by the court for the purposes of the action.

The situation of the parties and of the property in dispute is such that a final disposition of the cause cannot conveniently be made by this court, and it is recommended that the judgment of the district court be reversed and the suit remanded for further proceedings in accordance with law.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the suit remanded for further proceedings in accordance with law.

REVERSED.

LINCOLN SAFE DEPOSIT & TRUST COMPANY V. CHARLES WESTON, AUDITOR OF PUBLIC ACCOUNTS.

FILED OCTOBER 20, 1904. No. 13,726.

Claim against State. A creditor of the state is not excused from presenting his claim to the auditor of public accounts for settlement and allowance within two years after its accrual by the fact that the legislature has not made an appropriation for its payment.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

W. E. Stewart, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, contra.*

AMES, C.

Section 22, article III of the constitution of this state, prescribes that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon." Section 24 of article I of chapter 4 of the Compiled Statutes of 1901 provides for the payment of a bounty out of the state treasury to persons killing wolves in this state. Preliminary to such payment the statute requires that the person seeking it must make certain proofs before the clerk of the county in which the killing is alleged to have taken place, and that the county clerk, if satisfied with the truth and sufficiency of such proofs, shall make and deliver to the claimant a certificate to that effect, and that upon the presentation of such certificate to the auditor of public accounts the latter should draw his warrant for the amount named therein against the general funds in the state treasury. This statute was repealed by an act approved February 27, 1903 (Laws 1903, ch. 2). An act approved April 11, 1903 (Laws 1903, ch. 159), entitled, "An act making an appropriation for the payment of miscellaneous items of indebtedness owing by the state of Nebraska" contains the following lines: "Wolf bounty claims (estimated) $40,000." There had been no previous similar appropriation affecting the present controversy. Section 9 of article III of chapter 83 of the Compiled Statutes (Annotated Statutes, 9097) enacts that "in cases of claims, the adjustment and payment of which are not provided for by law, no warrant shall be drawn by the auditor, or countersigned or paid by the state treasurer, but all such claims shall be reported to the next legislative assembly, with such recommendation as the auditor may deem just"; and section 6 of the same article (Annotated Statutes, 9094) requires that "all persons having claims against the state shall exhibit the same, with evidence in support thereof, to the auditor, to be audited, settled and allowed within two years after such claims shall accrue."

Reading these two sections together, there seems to be but little, if any, room for doubt that the absence of an appropriation for the payment of a valid claim against the state does not excuse the claimant from presenting it to the auditor for settlement and allowance within the two years prescribed by the statute. In case of such absence, if the auditor deems the claim just and lawful, it is made his duty to report that fact to the legislature, and withhold his warrant until that body has provided funds for its payment. In such a case the legislature is the final court of appeal, although an intermediate or, rather, collateral appeal may be prosecuted in the courts. The plaintiff is the assignee for value of a large number of claims of the description mentioned aggregating in amount $288. Each of them has been duly proved before the county clerk of the county in which it arose, and the statutory certificates were filed with the auditor of state for allowance and payment, but a number of them aggregating $160, not until after the lapse of more than two years from their respective dates. These latter the auditor rejected, and an appeal was taken to the district court. The foregoing facts were disclosed on the face of the petition, to which a general demurrer was sustained, and the action was dismissed. The plaintiff prosecutes error.

We have already given, in substance, our reasons for thinking there is no error. The claims certainly did not "accrue"—that is, become established as lawful demands against the state—later than at the date at which lawful proof of them was made before the county clerk, and the latter issued certificates to that effect. We cannot think that the delay of the legislature to make provision for the payment of such demands operated in any manner to the prejudice of the claimant's rights as a creditor entitled to immediate payment. Nor can it be doubted that a creditor having an admitted or duly established demand, and so entitled, has an accrued claim which the statute requires him to present to the auditor for settlement and allowance within two years under penalty of being barred.

The appropriation act, above quoted, does not purport to remove the bar, but makes provision for the payment of existing claims, and cannot be regarded as applying to such as had already become extinguished by the statute of limitations. We therefore recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. MOSES ROBERTS.

FILED OCTOBER 20, 1904. No. 13,658.

Evidence examined, and *held* not sufficient to sustain the judgment of the trial court.

ERROR to the district court for Johnson county: GEORGE W. STUBBS, JUDGE. *Reversed and dismissed.*

J. W. Deweese, F. E. Bishop and *S. P. Davidson,* for plaintiff in error.

L. C. Chapman and *George A. Adams, contra.*

OLDHAM, C.

This cause of action is before the court for a second review on error. The first time it reached this tribunal every issue involved in the controversy was ably and carefully reviewed in an unofficial opinion by POUND, C., which may be found in 3 Neb. (Unof.) 425. At this hearing the cause was reversed and remanded because the evidence was not sufficient to support the judgment. On a new trial, directed by this court, substantially the same evi-

dence as that reviewed by the learned commissioner at the first hearing in this court was submitted, and plaintiff again had judgment, from which defendant prosecutes a second review to this court by petition in error.

When the cause was reversed and remanded, plaintiff filed an amended petition, in which it sought to charge negligence on defendant's part in the following allegation:

"That at said time, and as the plaintiff was attempting to cross at said public crossing from the south to the north, and after he had stopped and looked and listened, and saw no approaching object, or heard none, and after so looking and listening, and after he had started across said track to the north, and just as he was approaching said crossing from behind said line of box cars standing on said switch, as above mentioned, the defendant, by its employees, carelessly and recklessly ran at a high and rapid speed a hand car down and along said main track of said defendant's railroad from the west toward the east, carelessly, negligently and recklessly running the same down from behind the said line of box cars to, upon and immediately in front and under the heads of the horses of the plaintiff, which he was then driving, and by so doing, and by such reckless, careless and negligent running and operating of said hand car, scared and frightened said horses by its negligently coming upon and immediately in front of them and under their heads suddenly, and from behind said line of box cars, so that said horses at once became frightened."

The only additional evidence introduced at the last trial was that of witness Smith, who testified, in substance, that he was 75 or 100 yards north of the railroad, and saw the hand car after it had passed the depot, and that he thought the car was going a little faster than was usual in the yards. On cross-examination he said: "I could not tell you how fast it was going, because I had no time to see how fast it was running. I said I thought they were running a little faster than the usual gait." Witness Kelly

also testified in addition to what he said at the former hearing, in answer to the question, "At this time it was going along in just a usual manner, was it not? A. I guess it was the usual rate; I do not know what the usual rate of speed is; it was running not extremely fast nor extremely slow." The plaintiff also extended his testimony from what it had been at the former hearing by saying, in substance, that the hand car seemed to be running at a rapid rate when it brushed in front of his team. This was practically all the additional evidence introduced at the last hearing. As will be noticed by an examination of the amended petition, plaintiff relied for a recovery on the negligence of defendant in running its hand car at an unusual and dangerous rate of speed at the public crossing where the injury took place; and in conformity with this theory the court instructed the jury, at plaintiff's request, that:

"You are further instructed that it is the duty of every reasonable man to exercise caution to the extent necessary to guard against the particular or obvious danger with which he is confronted, and that in all circumstances he is required by the law to use such care and caution as an ordinary, reasonable and prudent person would exercise under such circumstances."

All the evidence introduced by defendant tended to show that the hand car was run in a reasonable and careful manner, at a rate not to exceed 5 or 6 miles an hour, up to and at the place of the accident, and as there was no testimony introduced by plaintiff tending to show an unreasonable or dangerous rate of speed, we are compelled to say for the second time that the judgment of the lower court is unsupported by any competent testimony. When the cause was here for review at the first instance, the writer of the present opinion said:

"I concur generally in every proposition discussed by my learned associate in this opinion, but as all evidence possible for the plaintiff to procure tending to show actionable negligence on the part of the railroad appears to have

been produced at the trial in the court below I see no good reason for remanding this cause. I think the petition should be dismissed and further litigation over the matter should be stopped." A second review strengthens this conviction.

We therefore recommend that the judgment of the district court be reversed and that plaintiff's cause of action be dismissed.

AMES, C., concurs. LETTON, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and plaintiff's cause of action dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, EX REL. WILLIAM J. CRANDALL, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED OCTOBER 20, 1904. No. 13,539.

1. **Common Carriers: DUTIES TO SHIPPERS.** A common carrier of goods is required to provide facilities for and to receive and ship goods tendered at its stations on payment or tender of the usual tariff rates, and has no right to discriminate or favor one shipper over another in rates or facilities.

2. **———: ———.** But this general principle is subject to the modification that if the carrier has furnished itself with cars sufficient to carry the freight which may reasonably be expected to be offered for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has exercised due diligence in that regard, and where through causes which are not within its control it cannot supply the cars temporarily made necessary by unusual demand therefor, it is entitled to apportion the same in a fair and equitable manner among its patrons, and cannot be compelled to provide one shipper with cars to the exclusion of others.

3. **Evidence.** Under the facts set forth in the opinion, *held*, that no unjust discrimination has been proved, and that the relator is not entitled to the writ of mandamus prayed for.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Affirmed.*

H. F. Rose, for plaintiff in error.

J. W. Deweese and *Frank E. Bishop, contra.*

LETTON, C.

This is an application for a peremptory writ of mandamus to compel the respondent to furnish and deliver to relator sufficient freight cars to enable him to ship all grain and mill products offered for shipment at the railroad station of the respondent at Firth, Nebraska, and to compel the respondent to furnish equal facilities and privileges to the relator in the matter of providing cars for the shipment of grain that are given to his competitor in business, the Farmers' Grain & Lumber Company.

William J. Crandall, the relator, now is and has been engaged, for a number of years, at the town of Firth, Lancaster county, Nebraska, in operating a mill and elevator, and of buying, selling, and shipping grain and mill products. A few years ago The Farmers' Grain & Lumber Company was organized by a number of farmers residing in that locality for the purpose of dealing in grain, and ever since this corporation began business sharp competition has existed between the respective grain dealers. Both of these parties occupy elevators situated upon the line of railroad of the respondent. It appears that in the early part of 1903 a shortage of cars existed on the lines of the respondent, and that it was compelled to apportion the cars available at that time between the grain shippers operating upon its lines of railroad, and it further appears that during this time the respondent had furnished cars in equal numbers to the rival grain dealers at Firth for the shipping of grain, upon the theory that, as a grain dealer, Crandall was entitled to an equal number of cars with the Farmers' Grain & Lumber Company, and, in

addition thereto, as a miller, he was entitled to whatever cars he could use and the railroad could furnish for the purpose of shipping his mill products; but that, since the mill products were for the most part destined to southern points, foreign cars were furnished him specially for such shipments. Under this arrangement, Mr. Crandall, from the 1st of December, 1902, to the 12th of February, 1903, had been furnished in all 102 cars, while the Farmers' Grain & Lumber Company had been furnished 47. After the 12th of February, 1903, the railroad agent at Firth, Nebraska, was instructed by C. B. Rogers, the division superintendent, that after that date the railroad company would furnish Mr. Crandall cars for flour, bran and straight car loads of corn meal as mill products, and then divide the remainder of the available cars evenly between Crandall and the Farmers' Grain & Lumber Company, and that under this ruling mixed car loads of corn meal, chop, cracked corn and sack corn would be counted at their capacity as cars loaded with grain.

It would seem that the moving cause of this order was the fact that a complaint had been made by the Farmers' Grain & Lumber Company to the railroad company that Crandall was obtaining more than his share of cars by reason of his shipping chop and cracked corn as mill products, when they ought of right to be counted as grain in the division of cars, and thus that the Farmers' Grain & Lumber Company was being unduly discriminated against in the apportionment of cars furnished. Following the making of this order, whenever Crandall shipped a car load of chop or of mixed chop and sack corn or oats, the agent at Firth furnished a like capacity of cars to the Farmers' Grain & Lumber Company for the shipment of grain, and out of this order and the action of the agent of the railway company in accordance therewith this controversy takes its rise.

It is apparent from the whole testimony that the officers of the railroad company endeavored to fairly and equitably apportion cars for the shipment of grain between these

contending parties. The determination of the question at issue depends almost wholly upon whether the article of commerce which is termed "coarse meal" or "chop" by Mr. Crandall, and is denominated "cracked corn" by the respondent and the Farmers' Grain & Lumber Company, should be considered as grain for the purpose of the apportionment of cars or should be classed as a mill product. If this article is handled and dealt in by grain dealers and elevator proprietors, and is not known under the custom and usages of the trade as a mill product or meal, then the Farmers' Grain & Lumber Company would be entitled, under the rule adopted by the respondent, which seems to be fair and reasonable, to an equal capacity of freight cars for shipment of grain to those used by Mr. Crandall in the shipment of this product; whereas, if this article falls properly and legitimately under the head of mill products, and is to be considered as a manufactured article, Crandall would be entitled to such cars as the railroad could furnish him to use in his milling business, including the shipment of this product, and, in addition thereto, with as many cars for grain shipments as were furnished to his competitor. A sample of this product taken from a sack in a car loaded by Mr. Crandall was in evidence in the district court, and is attached to the bill of exceptions in this case. A number of witnesses engaged in the elevator and grain dealing business testified that this article was what is known in the trade as "cracked corn"; that it is manufactured simply by crushing the corn between rollers, and is not cleaned or bolted in any manner, the resulting product being the same as that produced by the ordinary farmers' feed mill; while Crandall testifies that it is properly known as "coarse corn meal," though admitting that it is so produced. It seems also that in the southwestern tariff sheet a higher rate is charged for corn chop than for corn, and that on respondent's system "chop" is classified as a separate item. It is therefore contended by Crandall that this product is not properly shipped as grain but as a mill product.

Should the "chop," "cracked corn" or "coarse meal," as it is variously termed, be regarded in the distribution of cars as a grain or as a mill product? This question is not free from doubt. It is shown that a number of elevators in this state which do not do a milling business have had a demand from their customers for cracked corn for feeding purposes, and that to meet this demand they have installed roller machinery for the purpose of cracking the corn, and that the article thus manufactured is handled and sold as other corn by grain dealers. On the other hand, it is shown that Mr. Crandall has installed expensive machinery at his mill for the purpose of manufacturing corn meal. But it is also shown that in the manufacture of corn meal for culinary purposes the corn is first kilndried, then cracked or ground between rollers, and afterwards bolted, and that in the manufacture by him of this "coarse meal" or "cracked corn" the same rollers are used, but they are set farther apart so as not to crush the grain so finely; that the corn is not kilndried and the product is not bolted. The corn is merely passed between the rollers and from there loaded into the car. After examining the sample attached to the bill of exceptions and considering the evidence in the case, we are convinced that this substance properly belongs under the head of "cracked corn" or "chop," and is not in the ordinary acceptation of the term "meal"; and we are further convinced from the testimony that under the usages of the trade the article is properly handled by grain dealers as well as millers. Taking this view of the facts proved we are of the opinion that the distribution of cars as made by the respondent was not unfairly discriminative against the relator, but that, in view of all the circumstances, he has no reason to complain upon that ground.

The record shows that considerable ill feeling exists between some of the members of the Farmers' Grain & Lumber Company and Mr. Crandall, and that certain charges and complaints had been made to the railway company that Crandall had been shipping grain under

the guise of mill products by covering part of the contents of the car and thereby obtaining more than his share of cars. We are convinced, however, that these charges are not warranted by the evidence and that Crandall was honest and sincere in his opinion that as a miller he was entitled to all the cars the railroad could furnish for his use in shipping all kinds of mill products, including therein "cracked corn," and that as a grain dealer he was entitled to an equal number of cars with his competitor, excluding cars used for "cracked corn," "chop," etc. We are further convinced that no intention on the part of the respondent's agents or officers to discriminate unfairly against Mr. Crandall has been shown, and that they have been placed in the difficult position of trying to do business with two active and jealous competitors in such a manner as to remain upon good terms with both, a task almost beyond human power.

"How happy could" they "be with either,
Were t'other dear charmer away!"

The brief of the relator is largely devoted to the proposition that a common carrier of goods is required to provide facilities for and to receive and ship goods tendered at its stations on payment or tender of the usual tariff rates; that it has no right to discriminate or favor one shipper over another in rates or facilities and that such duties of common carriers are enforceable by mandamus. With this proposition we agree. Since the briefs in this case were filed, the case of *State v. Chicago, B. & Q. R. Co.*, 71 Neb. 593, has been decided by this court. That decision is in accord with the principles contended for by relator, but with the further qualification that, when the carrier has furnished itself with the appliances necessary to transport the amount of freight which may in the usual course of events be reasonably expected to be offered to it for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may

only occur in any given locality temporarily, or at long intervals of time. It appears that ordinarily the respondent has cars enough to meet the usual requirements of shippers, but that, owing to the long coal strike in the east, conditions had been abnormal, and the railroad company had at this time been unable to have returned to its line a large number of its cars which had been sent to points upon other railroads, and that it had found it necessary to impose an extra charge in the nature of a per diem for cars which were retained by other lines for more than 30 days, with the purpose of procuring an expeditious return of the cars. That owing to this scarcity it was impossible to furnish at this time all the cars necessary for use, not only by the relator, but by all other grain shippers along its lines in this state. Under this state of facts, the modifying principle above quoted applies, and if no unjust discrimination appears, no shipper has the right to complain because he has not been able to obtain carriage for all the goods which he may desire transported.

We are of the opinion that no failure of duty or unjust discrimination has been shown upon the part of respondent, and that the judgment of the district court should be affirmed.

AMES, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WILLIAM A. CAMPBELL, RECEIVER, v. ED M. TRACY, RECEIVER.

FILED OCTOBER 20, 1904. No. 13,561.

Decision followed. The decision in this case is governed by the principles announced in *Campbell v. Noyes, Norman & Co.*, *ante*, p. 201, which is followed.

ERROR to the district court for Johnson county: JOHN S. STULL, JUDGE. *Reversed.*

L. C. Chapman and *George A. Adams,* for plaintiff in error.

Ed M. Tracy, pro se.

LETTON, C.

This is a proceeding in error by which it is sought to review a judgment of the district court for Johnson county by which the defendant in error was adjudged to have a lien upon the real estate of the Chamberlain Banking House, a corporation, then in the hands of the plaintiff in error as receiver. It appears that, in the settlement of the affairs of the firm of Fairall & Rubelman, a partnership, a receiver was appointed by the district court for Johnson county, and an accounting had between said partners, to which the Chamberlain Banking House was made a party; among other things the court found that there was in the hands of the Chamberlain Banking House to the credit of said firm the sum of $292.19, and the following order was made in said case: "It is therefore ordered by the court that the defendant, the Chamberlain Banking House, pay to the receiver the sum of $292.19 now in its hands." No further order was made in this behalf, nor was execution awarded against the bank. Afterwards, and before the payment of this amount, the Chamberlain Banking House failed, and the plaintiff in error was appointed receiver thereof. Application was made by the defendant in error, as receiver of said firm of Fairall & Rubelman, for an order declaring his claim to be a lien upon the real estate of the corporation. The district court found "that the order made in the case of Fairall & Rubelman, though informal in its terms, is and was a judgment regularly entered in this court, and constitutes a valid lien upon said premises from the date of its being rendered," and

directed the receiver to pay the same out of the proceeds of the sale of the real estate. The principles governing this case are the same as those applied in the case of *Campbell v. Noyes, Norman & Co., ante,* p. 201. In that case there was an order directing the Chamberlain Banking House to pay to the person named therein a specified sum of money, but there was no recital that one party shall have and recover of the other a sum certain, and that in default of payment execution shall issue. It seems clear that no execution could issue upon the order directing the payment of the money by the Chamberlain Banking House to the defendant in error, without a further order being made by the district court. The reasoning in the opinion in *Campbell v. Noyes, Norman & Co.* applies to the facts in this case and we adopt the same.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

FRANCES A. M. EDDY ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPELLANTS.*

FILED OCTOBER 20, 1904. No. 13,572.

1. **Judicial Sale: APPRAISAL: ESTOPPEL.** Where the amount of an apparent tax lien not included in a decree has been deducted from the appraised value of the debtor's interest by the appraisers, and the purchaser, assuming that the taxes were valid, takes advantage of the deduction thereof, he will be presumed to have agreed with the judgment debtor that he will pay the taxes so deducted, and will not be heard to deny their validity in an equitable proceeding seeking to enjoin their collection.

* Rehearing opinions. See *post*, pp. 559, 561.

2. **Deed**: RECITALS: ESTOPPEL. Where a purchaser of lands which are subject to an apparent lien for special assessments procures the title to the premises by a conveyance which recites that they are subject to the specific lien of the special assessments, which with interest thereon the purchaser assumes and agrees to pay as a part of the consideration thereof, he will not be permitted in a court of equity to set aside the tax as invalid.

3. **Paving**: NOTICE. The provisions of a statute and ordinance requiring 30 days' notice to be given property owners to designate the material which they desire used in repaving are mandatory and jurisdictional.

4. **Pleading**: WAIVER: ISSUES. Where the charter and the ordinances of a city require notice to be given to property owners for 30 days to designate material for paving, and notice is not given for the specified time, and the city relies upon facts tending to show a waiver of the failure to give notice, it should plead the waiver in its answer, and no waiver having been pleaded the facts are outside of the issues in the case.

APPEAL from the district court for Douglas county: IRVING F. BAXTER, JUDGE. *Judgment modified.*

C. C. Wright, W. H. Herdman and *A. G. Ellick*, for appellants.

H. W. Pennock and *F. J. Griffin, contra.*

LETTON, C.

Separate actions were begun in the district court for Douglas county by Frances A. M. Eddy and others, and Mattie D. Valentine and others, against the city of Omaha and others, for the purpose of obtaining injunctions against the collection of certain special assessments in repaving districts No. 48 and No. 67, and special improvement district No. 597, in the city of Omaha. These actions were afterwards consolidated and tried together. A decree was rendered in favor of all the plaintiffs, except John H. Evans and Lizzie B. Evans, against the defendants, canceling the repaving and curbing assessments complained of, enjoining their collection and removing the cloud upon the title of the real estate belonging to the several plain-

tiffs caused by the assessments. From this decree the plaintiffs John H. Evans and Lizzie P. Evans have appealed, and so also has the city of Omaha, defendant.

Among other things the plaintiffs allege in their petitions that the petitions to the city council for the repaving were not signed by a majority of the owners of the foot frontage on the street to be improved; that the city failed to give 30 days' notice to property owners to select the material to be used in repaving; that there were not sufficient funds in the city treasury of the city of Omaha available to pay for the repaving of the intersections of streets and alleys at the time the improvement was ordered; that the notice of the time and place of the meeting of the board of equalization for the purpose of equalizing the repaving assessment was not given or published according to law; and allege a number of other defects in the proceedings which it is not necessary to notice. The city answered, denying the invalidity of the proceedings and setting up estoppels as to some of the plaintiffs. The court found in its decree that the assessment was null and void for the four reasons alleged in the petition and stated above. In the briefs of appellant, the city of Omaha, it is conceded that the assessment in controversy was null and void, for the reason that proper and legal notice was never given of the meeting of the board of equalization which purported to equalize the assessments. For this reason it will be unnecessary for us to examine the evidence in the case, except with reference to the rights of the appellants John H. Evans and Lizzie P. Evans, whom the court found were estopped from contesting the validity of the tax; with reference to those of the plaintiff, Harriet G. Pritchett, whom the appellant city of Omaha insists appeared before the board of equalization in pursuance to the defective notice, and thereby waived all defects in the form and service of notice of the sitting of the board of equalization; and with reference to those of the plaintiff, the Omaha Loan & Trust Company Savings Bank, which the appellant city of Omaha contends is estopped to question

the validity of the special assessments, by reason of the presumption that it assumed and agreed to pay the same, having received the benefit of the same by a deduction of the amount from the appraised value of the property affected at the time it purchased it at foreclosure sale.

These concessions narrow the field of inquiry. We will first consider the appeal of John H. Evans and Lizzie P. Evans. The evidence shows that they jointly procured title to lot 11, in block 4, in Summit Reserve addition to the city of Omaha, by a deed of conveyance which contained the following provision: "Subject to the state and county taxes for the year 1900, and to eight instalments for the repaving of Farnam street in improvement district No. 597, which, with interest thereon, the purchasers assume and agree to pay as a part of the consideration hereof." By these provisions the grantees bound themselves to pay the specific special assessments which were described in the deed and which are in controversy in this case.

In *Kruger v. Adams & French Harvester Co.*, 9 Neb. 526, as in the case at bar, the debt which the plaintiff assumed and agreed to pay did not constitute an actual lien upon the premises. While it was an apparent lien, still it possessed no legal force or validity. The court held, however, that if Kruger agreed with Wells, in consideration of the conveyance, to pay off the judgment of the harvester company, he could not be said to have done equity in the premises, when he came into court to enjoin the collection of the judgment out of the land, without first paying off the judgment according to his agreement. The doctrine in this case is just and equitable, it has become the settled law of this state, and it is now too late to attempt to change it. *Skinner v. Reynick*, 10 Neb. 323; *Bond v. Dolby*, 17 Neb. 491; *Koch v. Losch*, 31 Neb. 625; *Nye & Schneider Co. v. Fahrenholz*, 49 Neb. 276; *Farmers Loan & Trust Co. v. Schwenk*, 54 Neb. 657; *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286; *Goos v. Goos*, 57 Neb. 294; *Battelle v. McIntosh*, 62 Neb. 647; *Curtis v. Osborne*

& Co., 63 Neb. 837; *Omaha Savings Bank v. City of Omaha*, 4 Neb. (Unof.) 563; *Equitable Trust Co. v. City of Omaha*, 69 Neb. 342; *Hart v. Beardsley*, 67 Neb. 145.

There could hardly be a plainer application of this principle than in the case at bar. The purchaser obtained the benefit of the deduction from the consideration money of the amount of the eight instalments of special assessments, by reason of his agreement to pay the same. He deprived his vendor of this money upon the promise that he would pay it to the city of Omaha upon this specific special assessment. It would be manifestly inequitable to allow him to retain the money which he promised his grantors that he would pay, and at the same time allow him to come into a court of equity and ask it to relieve him from his agreement. As is said in *Equitable Trust Co. v. City of Omaha*, 69 Neb. 342: "If appellant does not propose to pay the taxes in question, what does he propose to do with the money he has withheld from the owner of the land?" The taxes were presumptively valid, and the owner of the property was at least under moral obligations to pay them. The facts in the cases cited by the appellants in their brief are clearly distinguishable from those in which the principle herein stated is laid down. By the agreement to pay the specific assessments, and by obtaining the benefit of the deduction of the amount of the same as a part of the consideration for the property, the appellees are estopped to maintain an action to set aside the apparent lien of these special assessments.

Omaha Loan & Trust Company Savings Bank:

As to the question whether the Omaha Loan & Trust Company Savings Bank is estopped to deny the validity of the tax, it appears that the property in controversy was purchased by the appellee savings bank at foreclosure sale; that upon the appraisal of the property for sale under the decree, the appraisers fixed the gross value of the same at the sum of $8,800; that certificates of liens were obtained and liens were deducted from the gross appraisal

as follows: Regular city taxes, $375.23; special assessments for paving in paving district No. 48, $170.23; special assessments for curbing and guttering in said district No. 48, $32.28; regular county taxes, $118.02. Total liens, $695.76, leaving the net appraisal, $8,104.24. It appears therefore that the special assessments in controversy, amounting to $202.51, were deducted from the amount of the appraisement. The property was sold to the plaintiff upon its bid of $5,425. The theory upon which the savings bank, the appellee, urges that no estoppel has arisen against its right to contest the validity of the special assessments is that, since its bid was only $441 less than two-thirds of the gross appraised value, and since it has paid the regular city and county taxes, amounting in all to $493.25, it derived no benefit from the deduction of the special assessments, and therefore comes into court with clean hands, having done equity in the premises by paying valid taxes to a larger amount than the advantage it gained by the deduction of both special assessments and regular taxes. This contention is based upon the idea that the only advantage the appellee gained was the difference between two-thirds of the gross appraised value and the amount of its bid; but the amount of the gross appraised value has no relation to the inquiry, and cannot be taken into consideration in determining whether or not the appellee has received the benefit of the deduction. The question is, not what the appellee might bid if no liens had been deducted, but what was actually done. When, in foreclosure sales, liens are deducted from the appraisal, a purchaser who buys under such appraisal will be presumed to have assumed and agreed to pay the liens, unless something to the contrary appears in the record. There is nothing in this case to set aside the presumption. A full discussion of the question of whether an estoppel arises under such circumstances is to be found in *Omaha Savings Bank v. City of Omaha, supra,* and *Equitable Trust Co. v. City of Omaha, supra,* also in the concurring opinion of SEDGWICK, J., in *Hart v. Beardsley, supra.* We

are of the opinion that the district court erred in finding that the appellee was not estopped to contest the validity of the special assessments, and the decree should be modified accordingly.

Harriet L. Pritchett:

As to Harriet L. Pritchett, appellee, it appears that although the notice of the meeting of the city council as a board of equalization was defective, yet she filed a protest before the board as to the repaving of Farnam street, and, so far as that street is concerned, such appearance waived the defect in the notice as to her. It is therefore necessary to consider whether or not the proceedings were otherwise regular as to her. The charter of the city provides, sec. 110: "It shall be the duty of the mayor and council to give the property owners in said district 30 days from the approval and publication of the ordinance declaring such improvement necessary, to designate by petition the material to be used in the paving of the streets." The ordinance which ordered street improvement district No. 597 repaved, which district includes the Farnam street property of appellee Pritchett, required the board of public works "to publish a notice to property owners within said street improvement district No. 597 to select the material for the pavement within their district, and to notify the council of such selection within 30 days of the publication of such notice; the hour and the day of the expiration of said 30 days to be made in said publication." In accordance with the ordinance the board of public works published the following notice: "Notice is hereby given that 30 days will be allowed you from the first day of publication of said ordinance No. 4245 within which to designate by petition to the honorable mayor and city council of the city of Omaha the material to be used in repaving said Farnam street. Said petition must be filed with the city clerk prior to 12 o'clock, noon, August 31, 1897, at which time the said 30 days will have expired." This notice was first published on August 2, 1897, and by

its terms the 30 days were to expire at noon on August 31, 1897. It is apparent therefore that the 30 days' notice by publication was not given as required by the ordinance. The provisions allowing the owners of property abutting upon any contemplated street improvement the privilege of designating the material by which the improvement is to be made are eminently just and fair. When the individual property owner is compelled to be charged with the burden of constructing street improvements for the benefit of the general public, as well as incidentally for his own benefit, it is proper and right that he should have a voice in the determination of the material to be used. It is he who bears the burden. Out of his pocket comes the money to pay for the material which is to be used. Provisions in a city charter which make it the duty of the mayor and council to give the property owners in an improvement district 30 days from the approval of the ordinance declaring such improvement necessary to designate the material to be used, and provisions in an ordinance based upon said provisions of the charter which require the publication of said notice for 30 days are mandatory, and, unless waived in some manner by the property owner to be affected, the lack of such notice will prevent the council from acquiring jurisdiction to levy a tax to pay for such improvement. *Morse v. City of Omaha,* 67 Neb. 426. In the instant case it appears that, before the expiration of the time fixed in the notice, a petition signed by the owners of a majority of the foot frontage of the property abutting on Farnam street, and designating certain material as the material to be used, was filed with the city clerk, and it is contended by the city that this waived the defect in the publication of the notice. This alleged waiver has not been pleaded in the answer. If the city relies upon the fact that the failure to give notice was waived by this action, it should have pleaded the facts in its answer. Not having done so, it cannot take advantage of the alleged waiver in its proofs. No such issue was tendered in the case. The city relied upon the sufficiency of the notice; it

was fatally defective, and proof of circumstances tending to show a waiver by some of the property owners was outside of the issues in the case and cannot be considered. The plea is of the nature of confession and avoidance, is new matter, and must be pleaded in order to be considered by the court. *Lowe v. Prospect Hill Cemetery Ass'n,* 58 Neb. 94; *Omaha Fire Ins. Co. v. Johansen,* 59 Neb. 349. We are of the opinion that by the failure to give notice to the property owners to designate material for the length of time prescribed, the council did not acquire jurisdiction to levy the special assessment for paving against the property of Harriet L. Pritchett within said district, and that therefore the decree of the district court with reference to this appellee is correct and should be affirmed.

It appears that the curbing and guttering in paving districts numbered 48 and 67 were ordered after the streets in said districts had been ordered paved. As the law stood at that time, the city council had the power to order curbing and guttering done upon streets which had been ordered paved, without any petition of the property owners being presented for that purpose. No limitation existed upon the power of the city authorities to charge the expense of such work upon the property abutting upon the improvement. For a discussion of the law as it then stood see *Orr v. City of Omaha,* 2 Neb. (Unof.) 771; *City of Omaha v. Gsantner,* 4 Neb. (Unof.) 52. The city therefore had jurisdiction to levy the special taxes for curbing and guttering in paving districts numbered 48 and 67, and such taxes were properly charged upon the abutting property.

A number of other questions are discussed in the able briefs which have been submitted, but since these considerations dispose of the matters in controversy they will not be considered. It was suggested upon the argument that the opinion of the court was desired in regard to a number of these questions, but suffice it to say that the proper function of the court is to decide causes which have actually arisen and not to anticipate other controversies.

We recommend that the cause be remanded to the district court, with directions to modify its decree so as to sustain the validity of the curbing and guttering taxes in paving districts numbered 48 and 67, and to dismiss the action as to the Omaha Loan & Trust Company Savings Bank. As to all other matters the judgment of the district court should be affirmed.

OLDHAM and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the cause is remanded to the district court, with directions to modify its decree so as to sustain the validity of the curbing and guttering taxes in paving districts numbered 48 and 67, and to dismiss the action as to the Omaha Loan & Trust Company Savings Bank. As to all other matters the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

The following opinion on motions for rehearing, leave to amend answers, and motions to modify judgment, was filed January 5, 1905. *Judgment modified:*

LETTON, C.

Appellants have filed motions herein, relating to that part of the decree in favor of Harriet L. Pritchett, for rehearing; for leave to amend answers in this court, and that the case may be remanded with directions to permit them to amend answers below. Since appellants seem to have misunderstood the language of the opinion as to the time of publication of the notice required to be given property owners to designate the material which they desire to be used in repaving, it is perhaps advisable to state that it was not the intention of the court to hold that this notice should be published each day for 30 days. Some of the ambiguity may come from the fact that the writer adopted the language of appellants' brief, wherein it is stated:

"It is apparent that the 30 days' notice was not given by publication as required by the ordinance." The statute and ordinance only require that the notice be published once, notifying the property owners that they must within 30 days of the publication of such notice select the material to be used. The notice in this case was published on August 2, 1897. It stated that the 30 days would expire on August 31, 1897, at noon, which was incorrect. Appellants now argue that, though the notice informed the property owners that the 30 days would expire at noon on August 31, this was a mere irregularity, because the charter, the ordinance and the notice itself informed them that they had 30 days from the publication of the notice within which to designate said material, citing *Armstrong v. Middlestadt,* 22 Neb. 711, and *Scarborough v. Myrick,* 47 Neb. 794. We are of the opinion that this argument is sound. That if, in fact, 30 days had elapsed before the council took any action upon the matter, the recital in the notice that the time would expire several days before the 30 days elapsed would be merely an irregularity, and would not prevent the council from acquiring jurisdiction. The evidence shows however that, on the first day of September, 1897, and before the expiration of 30 days from the publication of the notice, the council acted, and passed an ordinance ordering the improvement of the street by repaving with sheet asphaltum. We held in *Morse v. City of Omaha,* 67 Neb. 426, that the council was without jurisdiction to act until the expiration of the 30 days given property owners to select material, and are still of that opinion. The council, therefore, having acted before the 30 days expired, was without jurisdiction to pass the ordinance and its proceedings were void.

The appellees also filed motions to modify the judgment of this court as to the curbing and guttering assessments in paving districts numbered 48 and 67. The opinion holds correctly that the city council had power to order curbing and guttering done upon the streets which had been ordered paved, without any petition of the property owners being

presented for that purpose. It is conceded, however, that no notice of the sitting of the board of equalization held to equalize such taxes in said districts was ever given. This being so the assessment was unauthorized, and the taxes are void. The decree of the district court, therefore, as to such taxes should be affirmed.

At the hearing our attention was not called to the fact that the Omaha Loan & Trust Company Savings Bank was the owner of other property, the taxes upon which are in controversy in this suit, besides that situated in district numbered 48. The opinion therefore only relates to the property of the bank in that district, and the decree should be modified so as to provide that the action of the bank be dismissed as to its property described in district numbered 48, and that otherwise the judgment of the district court should be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the several motions of appellants herein referred to are overruled, and the judgment heretofore entered in this case is so modified as to dismiss the action of the Omaha Loan & Trust Company Savings Bank as to its property in paving district numbered 48 described in the pleadings. In all other respects the judgment of the district court is affirmed.

JUDGMENT MODIFIED.

The following opinion on second motion for rehearing was filed May 17, 1905. *Former judgment modified:*

1. **Paving**: NOTICE: JURISDICTION. Under the statute governing cities of the metropolitan class (Compiled Statutes, 1897, ch. 12*a*, sec. 110), property owners of a paving district must be allowed 30 days from the approval and publication of the ordinance declaring the improvement necessary in which to designate by petition the material to be used in repaving. But if a petition signed by the property owners representing a majority of taxable foot frontage, designating the material to be used, is filed, the mayor and council will not lose jurisdiction of the proposed improvement by acting upon such petition before the 30 days has expired, if no other

petition is filed within that time from which it appears that the necessary number of property owners have within the 30 days designated another material.

2. ———: PETITION: SIGNATURE OF CORPORATION. The president of a corporation is the proper party to sign a petition for repaving on behalf of the corporation. His signature will not be held invalid as unauthorized, although the board of directors took no action thereon, if it appears from the evidence that it had for some time prior to such signing been customary for the president to sign such petitions on behalf of the corporation without express authority from the directors, and that the directors knew of this custom and consented thereto, and had reason to believe that the president had signed the petition in question, and made no objection thereto until the improvement had been entered upon, relying upon the validity of such signature to bind the corporation.

3. ———: ———: ———. The board of education of the school district of Omaha may authorize its president to sign such petition in the name of the board, and the signature of the board by its president pursuant to such authority will bind the school district.

4. ———: STREET INTERSECTIONS: ASSESSMENTS: INJUNCTION. It is the duty of the city council to provide available funds with which to pay for street intersections before ordering the improvement. But after the improvement is made and the intersections actually paid for by the city, special assessments against abutting property cannot be enjoined on the ground that this fund with which to pay for the street intersections was not available at the time the improvement was ordered.

SEDGWICK, J.

This motion for rehearing involves principally the conclusion of the former opinions in regard to the assessment against the property of the plaintiff below, Harriet E. Pritchett. In the opinions heretofore filed this assessment is held invalid because 30 days, from the approval and publication of the ordinance declaring such improvement necessary, was not allowed the property owners in which to designate by a petition the material to be used. The statute does not provide for the giving of notice other than the publication of the ordinance declaring the improvement necessary, but the ordinance enacted provided

that the board of public works should publish a notice to property owners to select the material for the pavement, and also provided that the hour and day of the expiration of the 30 days should be stated in the notice. Accordingly notice was published that the 30 days would expire on the 31st day of August, 1897, and this notice was first published on the 2d day of August, so that by its terms the notice did not allow 30 days from the publication thereof in which to make the selection of materials.

A majority of the property owners united in a petition designating the materials to be used, and after this petition was filed, and before 30 days from the publication of the notice had expired, the council acted upon the petition and designated the materials as in the petition requested. It was held in the former opinions that the action of the council was invalid because it did not allow the full 30 days for making the selection. The plaintiff Harriet E. Pritchett did not sign the petition nor take any part in making the selection of materials. It was said in the opinion that this point has been determined in the case of *Morse v. City of Omaha,* 67 Neb. 426, and that it was there held that the mayor and council were without jurisdiction to determine the materials to be used in paving until after the 30 days had expired. We think this was an error, as this precise point was not involved in the case of *Morse v. City of Omaha, supra,* and the question is now a new one before this court. As the plaintiff Pritchett did not unite in the petition selecting the materials, she is not, of course, estopped thereby to now contend that the petition was insufficient or that the council acted prematurely thereon. It is insisted on behalf of the city that, since a majority of the property owners united in selecting the materials, the council might act thereon as soon as the petition was filed, and that it was unnecessary to delay the full period of 30 days for any further action on the part of the property owners in regard to selecting materials. We think that this reasoning is not conclusive to the extent insisted upon by the city.

The statute provides that when the same person signs more than one petition, his signature shall be counted upon the petition last signed. The matter of the selection of materials for the paving is an important one, and a property owner might upon full investigation be dissatisfied with his first conclusion, and, although a majority had petitioned for certain materials, it would appear to be entirely competent for the property owners to change their determination at any time within 30 days. So that if a second petition had been filed within the time limited, in which some of the former petitioners should join, and which was signed by the owners of half of the foot frontage of the district, requesting a different material from the one first designated, the council would no doubt have been required to act upon this second petition. This, however, in this case was not done, and since no other petition was tendered to the council, nor any different determination made by the property owners within the 30 days, it does not appear that this plaintiff was in any way injured by the action of the city council in that regard. The presumption must be, upon this record, that a majority of the property owners desired the council to take the action that it did in determining the materials to be used. Nothing appears in the record to the contrary. We think therefore the conclusion reached in the former opinions upon this point is erroneous.

2. There were other grounds urged in the briefs of the parties for holding this assessment erroneous, which it was said in the former opinions it was not necessary to consider because of the conclusion there reached. Upon the argument before the court in this motion therefore the other grounds were discussed, and it becomes necessary for us to look into the whole record to determine whether there is any other reason for holding this assessment invalid. The questions discussed in the briefs and oral arguments mainly depend upon the sufficiency of the original petition of the property owners for the repaving in question. The statute (Compiled Statutes, 1897, ch. 12*a*, sec. 110) provides

that: "No repaving shall be ordered except upon the petition of the owners of a majority of the taxable front feet in any improvement district." The plaintiffs objected to the genuineness and validity of many of the signatures to this petition. The trial court concluded that the petition was insufficient, and, in doing so, rejected the alleged signatures of the Omaha Savings Bank, Nebraska National Bank of Omaha, the Byron Reed Co., and the Coad Real Estate Co. The names of these corporations were signed to the petition in each instance by the president of the corporation, and represented the frontage of 463.2 feet. The contention was that it did not sufficiently appear that the president signing for the corporation was sufficiently authorized so to do. The findings of the court upon this point were: (*a*) "That at the time of signing the petition for repaving for and in behalf of the corporation, and for a long time prior thereto, it had been the custom and usage of the president of the corporation to sign for and on its behalf petitions for the improvement of streets by paving, or repaving, without first consulting the board of directors or without receiving special authority from them so to do. (*b*) That the board of directors of said corporation had knowledge of such custom and usage on the part of said president, made no protest and never objected thereto, and at all times acquiesced in such custom and usage. (*c*) That the board of directors at no time by resolution specially authorized the president to sign for and in behalf of the corporation the petitions for the repaving of Farnam street in district No. 597, nor was such authority conferred by the articles of incorporation or by-laws thereof." The conclusion of the court was that the signing by the presidents of the respective corporations was not authorized. In this we think the court was mistaken. Authorities are cited by the appellees which discuss the powers of corporations, but this is not a question of *ultra vires*. The corporation had power to join in this petition. The question was as to the manner of exercising that power. The statute provides that a deed of the corporation may be executed by the

president. There can be no doubt that the president was the proper officer to sign this petition in behalf of the corporation. It was the province of the board of directors to determine whether or not he should so sign it. It is not contended that the action of the president was contrary to the wishes of the board of directors. It appears that no express authority was given him by the board of directors to sign the name of the corporation. If the board of directors knew that it had been the custom of the president to act for the corporation in regard to such petitions, and if the president in pursuance of such custom had acted upon this petition, thereby leading all parties interested to suppose that the corporation had authorized the action, and if the board had acquiesced in such action until the time that this suit was begun, other parties in the meantime having acted upon it supposing that it was the desire of the corporation to be bound upon this petition, there can be no doubt that the board of directors, and the corporation which they represented, would be estopped thereafter to deny the validity of the corporate signature so executed by the president; and if the corporation itself would at the time of the commencement of this action be bound by the signature of the president, there can, of course, be no reason for allowing a third party to object to the sufficiency of the signature upon grounds that would not be available to the corporation itself.

It is said that the evidence is not sufficient to establish the custom or usage relied upon, at least as to some of the corporations named. Special reference is made to the evidence of Mr. Manderson, president of the Omaha Savings Bank, and of Mr. Yates, president of the Nebraska National Bank. Mr. Yates was questioned and testified as follows:

Q. And when you signed this you were president of the bank and one of the directors?

A. I was president and one of the directors.

Q. Did you consult with the other directors in reference to this pavement in signing this petition?

A. According to my recollection I did.

Q. What, if anything, Mr. Yates, did the other directors of the bank say to you in reference to this paving and you signing for the bank?

A. I can't recall exactly what was said, but it was the judgment of the directors that the pavement was desirable.

Q. And they so informed you?

A. And I was so informed.

There is no evidence that the directors ever repudiated the action of the president. They acquiesced therein, and there can be no doubt that at the time this action was begun the corporation was estopped to deny the power of the president to bind the corporation by his signature. It was not necessary to show a general custom or usage in that regard. Without going into a detailed discussion of the evidence as to the other corporations named, it is sufficient to say that it is equally conclusive. It is contended that the views above announced are inconsistent with the rule established in *Morse v. City of Omaha,* 67 Neb. 426. We do not so regard it. In that case it appeared affirmatively that the directors had no knowledge that any action had been taken purporting to authorize the improvement on behalf of the corporation. It did not appear that the circumstances were such that they ought to have taken notice that the president had signed for the corporation. The trial court found that the signature of the corporation by its president was unauthorized, and that finding was not set aside by this court. If 463.2 feet be added to the foot frontage found by the trial court to be properly represented upon the petition, there is a clear majority required by the statute. Unless some of the questioned property which was counted by the trial court as being properly represented upon the petition should be excluded, the petition was sufficient.

3. The property of the school district was included in the findings of the court as properly represented upon the petition. The signature upon the petition was "Board

of Education, by Jonathan Edwards, Prest.," and it represented a frontage of 215.5 feet. The title to the property in question was vested in the school district of Omaha. The board of education has control of the property of the school district. It is authorized to determine the question as to whether the paving would, or would not, be a benefit to the school district, and no other authority is authorized so to do. It appears from the record that, by a resolution of the board of directors, the president of the board was directed to sign the petition in question, and there can be no doubt that the president of the board in signing the petition signed for the school district of Omaha, and intended thereby to bind the property of the district, and that the board which directed him so to do was fully authorized to have so directed. We think there is no doubt that the trial court was right in counting this property as included in the petition.

It is confessed in the brief that the trial court was also right in counting the property of the Imperial Loan and Trust Company which amounted to 57 feet frontage. One-half of the taxable frontage of this improvement was 5,798.55 feet. The amount of the frontage represented upon the petition and not in dispute was 5,108.57 feet; add to this the foot frontage represented by the four corporations above named, the board of education, and Imperial Loan & Trust Company, and the amount represented upon the petition (5,844.27 feet) constituted the foot frontage required by the statute. It is not necessary therefore to examine as to the validity of other signatures discussed in the briefs.

4. It is contended that the city council was without jurisdiction to order the improvement in question because, as it is alleged, there were not sufficient funds available to pay for the street and alley intersections. It appears from the stipulation that the cost of paving the intersections was found to be $5,392.88, and that at the time the improvement was ordered the cash balance in the "paving fund" was $6,016.98. At the general election held three

months before the improvement was ordered, bonds for this purpose were authorized in the amount of $25,000 pursuant to the provisions of the statute. These bonds were afterwards issued and sold, and the money had been placed in the paving fund before it was necessary to pay for the street intersections. Under this condition of the record it is not necessary to determine when the funds necessary to pay for these intersections might be said to be "available." Nor is it necessary to determine whether it was the duty of the city council to make such provisions that cash would actually be in the paving fund with which to pay for these intersections before the improvement was ordered.

In *Morse v. City of Omaha,* 67 Neb. 426, after disposing of the questions necessary to a determination of the case, the writer of the opinion proceeded to decide other questions, to a discussion of which it was said counsel had devoted much of their briefs and oral argument. In determining whether it was necessary that there should be a specific declaration in the ordinance that the improvement was necessary, the writer said:

"In the provision for a petition of the abutting owners, the legislature has spoken clearly and in mandatory tones. So also with the provision regarding the status of the intersection fund. There is no difficulty under the authorities and this statute to hold these provisions jurisdictional."

It appears from the further discussion at that point that this statement quoted was purely dictum. We do not feel bound by it. The provision that there must be "funds available" for the intersections when the improvement is ordered appears to be for the benefit and protection of the city itself and the general taxpayers therein. It may be that the council could be prevented from ordering such improvements as these without "funds available" for the street intersections. If it should be thought that ordering the improvement was not justifiable while the paving fund was in the condition shown by this record, which is by

no means clear, we have no hesitation in concluding that after the improvement had been made and the intersections paid for by the city, the property owner could not avoid the payment of the assessment against his property upon the ground that the council exceeded its authority in ordering the improvement without first providing the cash with which to pay for the intersections.

It follows that the assessment against the property of the plaintiff Pritchett was valid, and that the decree of the district court should also be modified so as to sustain that assessment.

With this exception the former opinions herein are adhered to.

JUDGMENTS MODIFIED.

WILLIAM W. WHEATLEY, TREASURER, ET AL., APPELLEES, V. CHAMBERLAIN BANKING HOUSE ET AL., APPELLANTS.

FILED OCTOBER 20, 1904. No. 13,607.

APPEAL from the district court for Johnson county: JOHN S. STULL, JUDGE. *Reversed.*

H. F. Rose, W. B. Comstock and *Ed M. Tracy,* for appellants.

Jay C. Moore and *Hugh La Master, contra.*

LETTON, C.

The issues and facts in this case are substantially the same as those in the case of the *National Bank of Commerce of Kansas City v. Chamberlain, ante,* p. 469, and the proper disposition of this case is controlled by the decision in that. The judgment of the district court upon the issues in this proceeding should be reversed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded to the lower court for further proceedings in accordance with the opinion in *National Bank of Commerce of Kansas City v. Chamberlain.*

REVERSED.

EMMA SNELL V. LEWIS RUE.

FILED OCTOBER 20, 1904. No. 13,628.

Statute of Limitations. The provisions of sections 10 and 16 of the code, known as the statute of limitations, do not apply to actions upon domestic judgments.

ERROR to the district court for Nemaha county: ALBERT H. BABCOCK, JUDGE. *Reversed.*

J. S. McCarty and *H. A. Lambert,* for plaintiff in error.

S. P. Davidson, contra.

LETTON, C.

The question presented in this case is whether or not the provisions of the statute of limitations of this state apply to an action upon a dormant domestic judgment. The plaintiff in error contends that the provisions of the statute do not apply to an action brought in this state upon such a judgment, while on the other hand the defendant in error contends that the provisions of section 16 of the code, which provide "An action for relief not hereinbefore provided for, can only be brought within four years after the cause of action shall have accrued," apply. The judgment sued upon was rendered in 1897, and was dormant at the time this action was commenced. The argument of the plaintiff in error substantially is that, since an execution may issue upon the judgment for a period of five years

after its rendition, it could not have been the intention of the legislature to bar the bringing of an action upon the same claim while it was still an enforceable judgment, and that, since the code was enacted as a whole, the sections which provide that a judgment shall not be a lien upon real estate after the expiration of five years from the rendition thereof unless an execution is issued, and which provide for revivor of dormant judgments, and the sections of the statute of limitations which provide that an action may be brought upon foreign judgments within five years, are to be construed together, and make it plain and obvious that the legislature never intended that the statute of limitations should apply to domestic judgments. On the other hand, defendant in error insists that the provisions of section 16 are broad and sweeping in their terms and embrace actions of every nature other than those specifically mentioned.

In examining this question we have been able to receive but little light from adjudications in other states, the statutes of limitations of the several states being so different in their provisions that the decisions in each state are largely determined and governed by the local statute. The provisions of the code of the state of Ohio with reference to the lien of judgments, the time at which they became dormant, and the limitation of actions upon the same, were the same as those of this state are now, in 1864, when the case of *Tyler's Executors v. Winslow,* 15 Ohio St. 364, was decided by the supreme court of that state, except that our statute limits the time for bringing an action upon a foreign judgment to five years, while no mention was made in the Ohio statute of actions upon foreign judgments. In that case it was contended that a domestic judgment was a "specialty" and became dormant within 15 years, as provided by the statute. The court held, however, that a domestic judgment was not a specialty. It was further contended that the four years' limitation upon the bringing of all actions not specifically enumerated in the statute applied. In this connection,

however, the Ohio court, in the case above mentioned, say: "A domestic judgment is not embraced in the limitation of four years provided in the last clause of the section, for the obvious reason, among others, that by a contemporaneous act, taking effect on the same day with this, it was provided that such judgments should not become dormant until after five years. This court, however, are of opinion, that the judgments of the courts of this state are not subject to any of the provisions of the section under consideration. By this section, actions are limited to the specific period of each, 'after the *cause* of such action shall have *accrued*' or, 'after such *right* of action shall have *accrued*.' We think that a fair construction of this language, according to its ordinary import, excludes domestic judgments; and was intended, by the legislature, to apply to claims that accrue by maturity, or arise by the happening of events that give a right of action, as usually understood. It can hardly be supposed that, without any specific provision to that effect, it was understood that the merging of a cause or right of action, as ordinarily understood, in a judgment, was the accruing of a cause of action. Surely the object of adjudicating a claim or 'cause of action,' and the rendition of judgment thereon is not to mature, or 'accrue,' a right of action; but to terminate a cause of action in a judgment finally determining the rights of the parties, and to secure the remedies that follow a judgment. Undoubtedly a judgment is a cause or right of action of the highest nature, and that such action accrues when the judgment is rendered; but its objects and purposes are ordinarily so foreign to the mere maturity or accruing of a right of action that it would be deemed singular to speak of the rendition of a judgment, merging an adjudicated claim, as the accruing of a cause of action; and especially would this be so, in relation to a domestic judgment, where the only purpose of obtaining it may be the remedies that follow."

This case was decided after the adoption of the statutory provisions which are construed in the opinion by the ter-

ritory of Nebraska, and this court, therefore, is not bound by the well known principle of statutory construction to follow the decision. It seems to us, however, that the view taken by the Ohio court is in consonance with right principles. In this state a judgment does not lose its vital force by the expiration of five years after its rendition without the issuance of an execution thereupon. It is not dead, but sleepeth. This court has held that a sale of real estate made upon a dormant judgment cannot be attacked collaterally after confirmation, *Gillespie v. Switzer,* 43 Neb. 772, and that the payment of a dormant judgment cannot be recovered back. *Gerecke v. Campbell,* 24 Neb. 306. In some states, at the expiration of the statutory period, a judgment becomes actually dead and is possessed of no force or potency for any purpose whatsoever, but such is not the case in Nebraska.

An action may be brought in this state upon a foreign judgment within five years after its rendition; and it hardly seems probable that the legislature would debar its citizens from the same rights which it grants a creditor in a foreign state. Further, since by the issuance of an execution within five years a judgment may be kept alive in this state, or if dormant it may be revived, we would have the anomalous situation of a judgment being enforceable by execution, or revivable by proceedings for that purpose, and not enforceable by action after four years from its rendition. We are not forgetful of the language used in certain opinions rendered by this court, *State v. School district,* 30 Neb. 520, 528; *Beall v. McMenemy,* 63 Neb. 70, wherein it is said in general terms that by section 16 of the code the legislature intended to cover every form of action; such language, however, must be taken as applying to the specific case which the court was then considering, and under the view taken by the Ohio court, this language is not applicable to an action upon a domestic judgment. Statutes of limitations are intended as statutes of repose, but where the right of enforcement of a judgment by execution still exists after the bar which it is

claimed the statute interposes to an action has taken effect, the bar is of no avail so far as preventing the collection of the debt is concerned. Hence the statute fails of its purpose as a statute of repose. We cannot believe that the legislature intended to fix such a short time within which an action upon a domestic judgment might be maintained, and at the same time leave the judgment open to enforcement by execution.

In this state a judgment plaintiff, who has suffered his judgment to become dormant by failure to issue an execution upon the same within five years, may prosecute proceedings in revivor. We see no reason why he may not be permitted to enforce the same by action if the debt has not been paid. This has been the general rule in regard to dormant judgments in most jurisdictions. See 2 Freeman, Judgments (4th ed.), sec. 432, p. 751.

The right to prosecute revivor proceedings and the right to maintain an action upon the judgment are merely cumulative remedies. The plaintiff may have either or both, as he sees fit. We hold, therefore, that an action may be brought upon a dormant judgment and that the provisions of the statute of limitations do not apply to actions upon domestic judgments.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

OLDHAM and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

IN THE MATTER OF THE APPLICATION OF FRED H. KRUG FOR A LIQUOR LICENSE.

FILED NOVEMBER 2, 1904. No. 13,433.

1. **New Trial.** A motion for a new trial is not necessary in order to obtain a review of the judgment of the district court entered on the hearing of an appeal taken from an order of a licensing board granting or refusing a license to sell intoxicating liquors. *Bennett v. Otto*, 68 Neb. 652.

2. **Liquor License.** Under the provisions of section 1, chapter 50, Compiled Statutes, 1903, the licensing board, upon the hearing of an application to grant a liquor license, must pass upon the character and standing of the applicant and his citizenship, and the board is without authority to delegate these functions to another person or corporation by issuing the license in the name of one shown to be not the real party in interest, upon the understanding that such person or corporation will select a person to conduct the business under the license. *In re Tierney*, 71 Neb. 704.

3. ———. The board of fire and police commissioners of a city of the metropolitan class is without authority to grant a license to sell intoxicating liquors where the undisputed evidence discloses that the applicant has no interest in the license applied for, and that the same is for the exclusive use and benefit of a third party who is to be the unqualified owner and proprietor of the business of dealing in and selling intoxicating liquors for the sale of which the license is granted.

4. ———. A license to deal in intoxicating liquors is in the nature of a personal trust, and the applicant for such privilege must be a person able, willing and competent to carry out such trust, and not delegate it entirely to others.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed with directions.*

Charles Ogden and *Hamilton & Maxwell*, for applicant.

Cooper & Dunn, contra.

HOLCOMB, C. J.

This is a proceeding in error, prosecuted by the remonstrant, to have the record reviewed and secure the

reversal of an order of the district court dismissing his appeal taken to that court from an order of the board of fire and police commissioners of the city of Omaha granting a license to sell intoxicating liquors on the application of the person named therein as licensee.

1. It is urged by defendant in error that no motion for a new trial, as by law required, was filed in this case, and therefore no questions are properly presented for review. It is held in *Bennett v. Otto,* 68 Neb. 652, that a motion for a new trial is not necessary in order to obtain a review of the judgment of the district court entered on the hearing of an appeal taken from an order of a license board granting or refusing a license to sell intoxicating liquors.

2. The undisputed evidence in this case discloses that the applicant to whom the license was granted by the licensing board was not the real party in interest. It is, by the evidence submitted in support of the objections filed to the granting of the license applied for, rendered manifest that the business of dealing in intoxicating liquors for which the license was granted was to be conducted under the unqualified control, ownership and proprietorship of a third party, for whose sole and exclusive use and benefit the license was being obtained. The only possible qualification of absolute ownership of the business of owning and dealing in intoxicating liquors for the sale of which the license was granted is some evidence to the effect that the owner of the saloon would be required to conduct an orderly place of business. In principle, the case at bar comes altogether within the rule announced in *In re Tierney,* 71 Neb. 704. It is there held:

"Under the provisions of section 1, chapter 50, Compiled Statutes, 1903 (Annotated Statutes, 7150), the licensing board, upon the hearing of an application to grant a liquor license, must pass upon the character and standing of the applicant and his citizenship; and the board is without authority to delegate these functions to another person or corporation by issuing the license in the name of one shown to be not the real party in interest, upon the understand-

ing that such person or corporation will select a person to conduct the business under the license."

The evidence in the case at bar is positive and unequivocal to the effect that there existed no relationship whatever of principal and agent between the licensee and the owner and proprietor of the busines for whose benefit the license was being obtained. The license fee was not paid by the applicant but by the owner of the business, who thus sought to obtain authority to engage for himself and in his own behalf in the sale of intoxicating liquors. In speaking of the provisions of the law regulating the sale of intoxicating liquors, this court has heretofore said:

"An examination of the above provisions of law can scarcely fail to satisfy anyone that the people of this state have reserved to themselves, acting through the several local boards, county and city, the right to discriminate between the different applicants for liquor license, to license such applicants as upon the principles laid down should be deemed worthy, and refuse those who, upon the application of the same principles, should be held to be unworthy. A licensee, under the above provisions, accepts from the authorities a personal trust and assumes personal duties and responsibilities quite repugnant to the idea of his selling his license along with his stock on hand, furniture and fixtures. Under statutes much less discriminating than ours, it has been held by the courts of Kentucky, Indiana, Delaware, Alabama, Louisiana, Pennsylvania, New York, and other states, that a liquor license is a personal trust or permit, and is incapable of assignment. In some cases it has been held that the privilege of selling intoxicating liquors was of so personal a nature that it could not be exercised through an agent." *State v. Lydick*, 11 Neb. 366. In *Watkins v. Grieser*, 11 Okla. 302, 66 Pac. 332, it is held:

"A license to deal in intoxicating liquors is in the nature of a personal trust, and the applicant for such privilege must be a person able, willing and competent to carry out

such trust, and not delegate it entirely to others whose character may not be such as the law requires of the licensee." See also *Hall v. Hart,* 52 Neb. 4; *Semple v. Flynn,* 10 Atl. (N. J.) 177.

Upon the authority of the cases cited, the judgments and orders of the district court and of the board of fire and police commissioners must be reversed and the license granted canceled, which is accordingly done.

JUDGMENT ACCORDINGLY.

JOHN MCNEAL V. LIZZIE HUNTER.

FILED NOVEMBER 2, 1904. No. 13,609.

1. **Bastardy: TRIAL: PLEA.** Where on a trial in a bastardy proceeding, the defendant goes to trial upon the sole and only issue of his guilt as charged in the complaint, and on the theory that he has pleaded not guilty, and the case is so submitted to the jury, the fact that no formal arraignment and plea thereto is entered of record is an irregularity which at most is error without prejudice.
2. **Wavier.** The right to have the complaint read to him and to be allowed to plead thereto may be waived by the defendant, and he will be held to have waived the same where a trial is had as though such plea had been entered.
3. **New Trial.** A new trial on the ground of newly discovered evidence will not be granted where the proposed evidence appears to be hearsay and incompetent.
4. ———: A defendant will not be allowed a new trial on the ground of newly discovered evidence where it appears that such evidence was known at the beginning of the trial, and no seasonable effort was put forth to procure such evidence at the trial or to secure a postponement of the trial before a final submission of the case to the jury, and until such evidence could be secured.
5. **Evidence** examined, and found to be sufficient to sustain the verdict of the jury.

ERROR to the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

W. W. Wood, for plaintiff in error.

C. Patterson, contra.

HOLCOMB, C. J.

On a trial had to the court and a jury, a verdict was rendered finding the defendant guilty on a complaint charging him with being the father of a bastard child delivered by the complainant, Lizzie Hunter. After the overruling of a motion for a new trial, the defendant was by the court duly adjudged to be the reputed father of the said child, and ordered to stand charged with its maintenance in the sum of $300, to be paid in instalments as in the judgment provided, also to pay the costs of the action, and to be confined in the jail of Sheridan county until the judgment was complied with or bond given as required by law for the performance of such judgment. The defendant prosecutes error.

1. It is assigned as error that the court ordered the issue in the case to be tried to a jury, and the trial thereof had on the complaint, without the defendant being arraigned and given an opportunity to plead to the complaint. The record does not affirmatively show a formal arraignment on the complaint and a plea thereto by the defendant. In the instructions of the court, the jury were told that the defendant had been duly arraigned upon such charge, and had entered a plea of not guilty, and that this plea of not guilty put in issue the truth of said charge. It is altogether clear from an inspection of the record that the only issue submitted to the jury was that of the guilt of the defendant of the act charged in the complaint; and that the case proceeded to a trial and judgment upon the theory, and was so treated by both parties, that this, and only this, issue was raised by the pleadings. It is equally manifest that the defendant during the whole of the trial was vigorously denying his guilt and protesting his innocence; that he submitted evidence

in support thereof, and upon that issue the jury found against him. We cannot possibly see how the defendant was prejudiced, even though no formal arraignment and plea were entered of record. His right in this respect to be arraigned and to be allowed to plead to the complaint, like all others in a civil action, may be waived. The defendant could, if he desired, elect to appear and resist the charge in the complaint, and it was not incumbent upon him to file any written plea. 5 Cyc. 665, par. 3. For the same reason, he could waive the formal reading of the complaint and the entering on the record of a plea of not guilty. It is hardly to be doubted that in this case the defendant, by going to trial and trying his case as though the issue had been regularly made up, waived any right he might have regarding a formal arraignment and plea thereto. Conceding, therefore, the irregularity complained of, it at most is only error without prejudice, and regarding which the judgment ought not to be reversed.

2. Error is also sought to be predicated on the ruling of the court denying the defendant a new trial on the ground of newly discovered evidence. There are two reasons, we think, why this contention cannot be sustained. In the first place, much of the proposed evidence was hearsay and incompetent, being alleged statements of third parties not shown to have been made in the presence and hearing of the complainant. Eliminating the incompetent evidence, the remainder was in no wise contradictory of the testimony of the complainant; the object being to offer evidence as tending to prove that the complainant had made a statement as to who was the father of her illegitimate child, inconsistent with the charge made against the defendant. In the second place, the proposed evidence was known to the defendant or his attorney before the final submission of the case on the first trial, and there is an entire absence of evidence showing due diligence to procure it in time to be submitted at the original trial, or to secure a brief postponement until the witness could be procured. The affidavit of the attorney for the de-

fendant recites that he learned of such evidence on the morning of the day set for the trial of the cause; that he caused a subpœna to issue, but that the witness did not appear in obedience to the subpœna till the close of the trial; and that during the progress of the trial and before the defendant rested his case, he submitted to the presiding judge what he had been informed the absent witness would swear to, and was informed that the evidence as detailed could not be allowed, whereupon the case was submitted to the jury. While this may be a very informal way of presenting an application for a postponement of the hearing until the witness could be procured, the legal effect, if it has any, is an acquiescence by the defendant in the ruling of the trial judge, with no exceptions taken thereto and regarding which error would not lie. But if this informal presentation of the matter during the trial is to be disregarded, then it is equally clear that the defendant did not act with reasonable diligence when he failed to procure the attendance of the absent witness, and failed to make an application for a postponement of the trial till her attendance could be procured before entering upon a trial of the case, and before the final submission of the cause to the jury. A party knowing of the existence of material evidence in his behalf before the trial, or before his cause is finally submitted, cannot be permitted to submit his case to the jury on the evidence at his command, and thereafter, if the cause goes against him, obtain a new trial on the ground of the discovery of such evidence and his failure to produce it at the original trial. He must be prompt and diligent, and in this action it was the duty of the defendant to make his application for further time at the time he learned what the absent witness would testify to, and before the cause then about to be tried was finally submitted for a verdict and judgment.

3. Lastly, it is argued that the evidence is not sufficient to support the verdict of the jury. The evidence preserved by the bill of exceptions has been examined, and, while

it is not as strong and convincing as might be desired in order that any doubt as to its sufficiency might be dissipated, yet we are not prepared to say that it is not legally sufficient to support the jury's finding. There is competent evidence to support the verdict. The evidence, it is true, is more or less conflicting. The jury saw and heard the witnesses. It was for them to weigh and consider the testimony of each and all of them. "The paternity of the child being the fact to be determined by the jury the credibility of the witnesses, the opportunities for intercourse, the duration of the period of gestation, and the fact that a bastard child has been born are all matters which may be considered by them in arriving at their verdict." 5 Cyc. 667, par. 8. A finding upon such evidence, under a well recognized rule, cannot rightfully be disturbed by this court. We cannot say the verdict is clearly and manifestly wrong and unsupported by sufficient evidence. The action is essentially civil in its nature, and a preponderance of the evidence is all that is required. We find no prejudicial error in the record, and it follows that the judgment of the district court should remain as announced and rendered.

AFFIRMED.

HUGH MCCAFFREY, APPELLEE, V. CITY OF OMAHA ET AL., APPELLANTS.

FILED NOVEMBER 2, 1904. No. 13,787.

1. Cities: STREET IMPROVEMENTS. Where the wearing surface of a paved street in a city of the metropolitan class has become so rotten and decayed as to be unfit for use, and in a work for the improvement of such street it is proposed and required that all the material composing the wearing surface of the entire portion of the paved street shall be removed and a new material of the same or of a different kind replaced or relaid thereon, even though on the same concrete base, such proposed work constitutes a "repaving" of the street as distinguished from "re-

pairing," as those words are used in the charter act of such cities, applicable to and regulating the manner and method of improving such streets.

2. **Repaving**: PETITION. In the case at bar, it is *held* that the contemplated improvement of the street is essentially and in substance a "repaving" thereof as distinguished from "repairing," and can be engaged in by the city authorities only upon a petition of the abutting property owners, when it is proposed to tax back to the abutting property the cost of such improvement.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

C. C. Wright and *W. H. Herdman,* for appellants.

Frank H. Gaines, contra.

HOLCOMB, C. J.

This is a suit for an injunction, brought by the plaintiff, appellee here, for the purpose of restraining the appellants, the mayor and council of the city of Omaha, from awarding a contract for certain work for the improvement of a street in one of the paving districts of the city of Omaha, and from taxing back to the abutting property owners the cost of such proposed improvement. To the petition filed in the trial court the defendants interposed a demurrer, which upon consideration by the court was overruled, and an order entered perpetually enjoining the defendants from proceeding further under the proposed contract to make such improvement in the manner as therein contemplated, and from taxing the cost thereof to the abutting lot owners. That portion of the petition material to a proper understanding of the case alleges that "said 16th street from the south line of Douglas street to the south line of Izard street was many years ago paved with asphalt, and that the guaranty period of such pavement has long since expired, and that the pavement is in a very defective and rotten condition, said pavement being full of large holes, and the entire asphalt surface thereof being

decayed and rotten and practically unfit for use, and that the base of said pavement is in many places much worn, and that the surface of such pavement is in such a condition that it is impracticable to repair the same"; that there was "prepared a proposal for repairing the asphalt pavement on 16th street between the south lines of Douglas and Izard streets with sheet asphalt, * * * and for maintaining such pavement in a condition of continuous repair each year for a period of five consecutive years. * * * Said proposal and form of specifications were duly submitted to the city council, and by said city council duly approved on April 26, 1904, and approved by the mayor of Omaha May 2, 1904. That, in accordance with said specifications and proposal, * * * bids * * * were duly opened, and it was found that the Barber Asphalt Paving Company had made the lowest bid upon such repairs, to wit, for first year, $27,985; second year, $498.05; third year, $498.05; fourth year, $498.05; and fifth year, $498.05; and that, * * * unless restrained by the order of this court, the city of Omaha, through its city council and its board of public works, will enter into a contract with said Barber Asphalt Paving Company in accordance with said proposal. That, under and by virtue of the terms of said contract, the said city of Omaha intends to, and will, unless restrained by the order of this court, proceed to assess and levy against this plaintiff, and the property owned by this plaintiff, and all the property abutting on said 16th street between the south lines of Douglas and Izard streets, the cost of said repair and maintenance, claiming and pretending to act under and by virtue of the provisions of the charter of said city of Omaha, to wit, chapter 12*a*, Compiled Statutes of the state of Nebraska, 1903 (Annotated Statutes, 7450-7688)." The proposal and specifications were attached to and made a part of the petition. But two propositions are argued by counsel appearing in the case, and presented for consideration; the first being, does the proposed street improvement, assuming it to be repair work, come within the

scope and purview of section 6, article IX of the constitution, which provides that "The legislature may vest the corporate authorities of cities * * * with power to make local improvements by special assessment, or by special taxation of property benefited," the right to make such proposed improvement and levy a special tax therefor being derived solely from these provisions? The second is, if it be determined that the proposed improvement, while under the form and name of a repairing of the street, is essentially and in substance a repaving of it, then it is conceded that the right to make such improvement and levy a special tax on abutting property owners for the cost thereof is prohibited by the city charter, which confers such power upon the mayor and city council only through a petition of the abutting property owners, and that such petition is wanting in the present case.

We are content to rest the decision heretofore announced in this case on the latter proposition. The work which it is proposed to engage in, as alleged in the petition and the truth of which is admitted by the demurrer, is, we think, in substance and essentially a repaving of the street, although designated in the proposal and specifications under which the contract was about to be awarded as a work of repair and maintenance. The record in this case in all its material aspects presents questions very similar to those considered and determined in *Robertson v. City of Omaha*, 55 Neb. 718. The two cases are quite analogous. The rule announced in that case is in point here. In the case cited, it is declared in the syllabus that:

"Where, in case a street paved with wooden blocks laid on a concrete base, such blocks have become worthless and are entirely removed in pursuance of a contract entered into with the city, and replaced with vitrified brick laid on the old base, such new improvement is not an 'ordinary repair' within the meaning of the statute, but is a repavement of the street, and to pay the cost thereof a special assessment may be made against the abutting real estate." In the opinion it is said:

"The final argument presented is that the work done by Murphy under the contract was not a repavement of Leavenworth street, but was merely a repair of an existing pavement, and, therefore, the city was liable therefor, and it possessed no authority to impose a special assessment against the real estate of plaintiffs to pay the same. This contention is grounded upon the single fact that the concrete foundation of the former cedar block pavement was utilized in making the improvement in controversy. The entire wearing surface of wood of the old pavement was removed and replaced with vitrified brick, and the mere using of the old base of concrete did not constitute the work an 'ordinary repair' within the meaning, and contemplation, of the statute. The assessment assailed was made for the repavement of the street."

But it is argued the contract in this case is to be let for repairing and keeping in repair, and that the essential elements of a repaving do not exist; that the original grade and plan of the improvement are preserved, and that the repairs are to be of the same material which distinguishes this case from the one cited, the holding in which, it is said, was influenced by the fact that a new and different character of material for the surface was to be laid. The quality or character of the material used in putting on the new pavement or surface does not, to our mind, essentially change the nature of the work which is being done. What is in fact contemplated, what is the nature of the work to be done, must determine whether it is properly a work of "repair" as used in the charter act, or whether it is "repaving" within the meaning of the word as therein found. Repaving, the act declares, can be done only upon a petition of the abutting property owners, when the cost thereof is to be taxed back to the property benefited. In this case, it is admitted that the entire asphalt surface had become decayed and rotten and practically unfit for use, and that it is impracticable to repair the same by patching. The allegations of the petition in this respect are emphasized by the conceded facts

as to the requirement of the specifications and the cost of the proposed improvement contained in the proposal on which the contemplated contract is based. While the work is denominated a repairing of the street for the first year, and its maintenance for each of the other of the five years, yet the cost of the work to be done the first year, as compared with the mere nominal cost of keeping it in repair thereafter, is almost conclusive of the fact that, as alleged in the petition, the entire asphalt surface is to be relaid, and the concrete base repaired wherever necessary to bring it back to its original level. What is contemplated and required to be done is to entirely replace upon the concrete base a stratum of new asphalt, forming the surface of the street as it is used for public travel. It is not, we think, required that the whole of the material used in the paving in the first instance shall be relaid, or a change made in the original plan or grade, in order to constitute the work a repaving within the meaning of that word as used in the charter act of cities of the metropolitan class. To repave is to relay, not necessarily the whole of the pavement as originally constructed, but it is to pave again, cover over with suitable material, or resurface the street, when the surface material as originally laid has become destroyed, so that it is no longer usable. There can, we think, be no distinction in sound reason or principle for saying that, where the surface of the street is laid with brick upon the same concrete base, in place of wooden blocks which have been worn until they are useless, that this is a repaving; but that, if on a like base, when all of the old surfacing, whether it be blocks, brick, or asphalt, is removed, and new material used in replacing and relaying such surface of the same kind as the old, this would constitute a repair only, whether ordinary or otherwise, as distinguished from repaving, within the meaning of that word as used in the statute. If repaving as used in the act means only a new pavement constructed after a regrade or change of plans, and not until the destruction of the old, and every part of it, then, indeed, would there be

but little repaving done, and the statutory provisions relating thereto would be of but little practical use. The legislature, we apprehend, used the word in a different sense, and provided for a plan of repaving with the view of protecting the interests of property owners, and inhibiting a work of such importance and involving such great expenditure to be met by taxing the abutting property, except upon a petition of the owners of such property. The act, we think, contemplates that, when the original paving has become so unfitted for use or destroyed to such an extent as to be useless, so that the whole of the paved portion of the street is required to be relaid or resurfaced with some suitable new material, whether the same kind as, or different from, that originally used, and although on the same concrete base, the work shall be regarded and treated as a repaving, and that such improvement can be made only subject to the provisions relating thereto.

From an examination of the entire record, we are of the opinion that the proposed improvement in the present instance is, in substance and essentially, a repaving of the street within the meaning of the word as used in the charter act, and, as such, can be undertaken only upon a petition by the property owners, where it is proposed as it is here to tax the cost of such improvement to the real estate abutting on the street as thus improved. It is for these reasons that the judgment of the district court is

AFFIRMED.

LOUIS RUZICKA, APPELLEE, V. MATT HOTOVY, APPELLANT.

FILED NOVEMBER 2, 1904. No. 13,458.

1. **Statute of Frauds:** MEMORANDUM OF CONTRACT OF SALE. A memorandum of a contract of sale which fails to specify which quarter of a named section of land is intended, and states the number of the range without specifying whether it is east or west, is not void under the statute of frauds for uncertainty in description,

if the description is otherwise specific, and the land intended can be identified from the description with the aid of parol evidence.

2. ———: ———. Our statute of frauds does not require all the terms of the contract to be stated in the written memorandum thereof; if the time for consummation of the contract by executing the deed and paying the consideration is not stated, nor whether securities are to be given for deferred payments, if any, these matters may be shown by parol evidence.

3. **Specific Performance:** DECREE. A provision in a decree of specific performance in favor of a plaintiff that plaintiff shall secure deferred payments by mortgage upon the premises is not prejudicial to defendant, and, plaintiff not having appealed therefrom, it will not be disturbed.

4. **Appeal:** DEPOSIT. When a decree in equity requires the plaintiff to deposit money or securities in court as conditions precedent to enforcing the decree against the defendant, and defendant, within the time limited for making such deposit, appeals from said decree and supersedes the same, the time allowed for making the deposit is thereby extended until a like time after the decree becomes again enforceable.

5. **Decree:** INTEREST. It being contemplated in the contract that interest on deferred payments should run from the completion of the contract by the execution of the conveyance, the decree is sufficiently definite upon that point if it specifies when the deed is to be made, and the notes and mortgage for the deferred payments executed. It will be implied that interest is to run from the execution of the notes.

APPEAL from the district court for Butler county: SAMUEL H. SORNBORGER, JUDGE. *Affirmed.*

Arthur J. Evans and *L. S. Hastings,* for appellant.

Matt Miller, contra.

SEDGWICK, J.

Decree was entered in the court below in favor of this plaintiff for the specific performance of a contract as follows:

"DWIGHT, NEB., 7-11-1901.

"I the undersigned Louis Ruzicka tender one hundred

dollars on ¼ Sc. 7, T. 13, R. 4 and have purchased same for $5500.00 on 5 years, 4 years at $900.00 and 5 years $1200.00 at 5%. M. HOTOVY."

The principal question contested in the court below and mainly relied upon here is the sufficiency of this memorandum under the statute of frauds. Issue was tendered in the answer as to the execution of the memorandum by Mr. Hotovy, and there were allegations that it was procured by fraud; but the findings of the trial court upon these questions are so manifestly supported by the evidence, and the only findings that the evidence would warrant, that it seems unnecessary to discuss them here.

1. It is first contended that the memorandum is too indefinite to be enforced, because it does not specify which quarter of the section was intended, nor whether the range in which the land lies is east or west of the meridian. The petition alleges that the southeast quarter of the section was intended, and that the land contracted for lies in range 4 east of the 6th principal meridian. The evidence shows that Mr. Hotovy at that time owned the southeast quarter of section 7 in township 13 north of range 4 east of the 6th principal meridian; that this land was then being occupied and used by his tenant; that he had no other land that could possibly have been intended; and that both parties understood these facts and contracted with reference to this farm. This renders the memorandum sufficiently definite in this respect to comply with the statute of frauds. The case of *Ballou v. Sherwood,* 32 Neb. 666, is precisely in point, and disposes of this objection. *Adams v. Thompson,* 28 Neb. 53.

2. The second objection to the memorandum is more serious. The defendant contends that the memorandum to comply with the statute of frauds must state the consideration and the terms and conditions of payment. The second paragraph of the syllabus in *Nelson v. Shelby Mfg. & I. Co.,* 38 Am. St. Rep. 116 (96 Ala. 515), is:

"A contract for the sale of land is not sufficient to

satisfy the requirements of the statute of frauds if the precise terms of payment cannot be ascertained therefrom without resorting to parol evidence."

This appears to be the rule applied by a large majority of the courts of this country, but we do not consider it to be the law in this state.

In *Morrison v. Dailey*, 6 S. W. (Tex.) 426, the memorandum was: "Lancaster, June 28, 1887. Received from H. Morrison forty dollars on my place, known as the 'James Perry Tract of Land,' which tract I have sold to him for forty-five hundred dollars, part cash, and the balance to bear interest at ten per cent. per annum until paid. Mrs. N. B. Dailey,"—and the court, in discussing the fact that there was no mention in the memorandum of the time of payment of the balance of the purchase price said:

"The weight of authority seems to be in favor of the rule that all the material terms of the contract should appear in the writing (citing cases). But the contrary rule is not without authority to support it (citing authorities which hold a different rule). The courts which held the affirmative of the question seem to base their conclusion upon the ground that, by the use of the word 'agreement,' or of the word 'contract,' the statute meant all stipulations agreed to by the parties. On the other hand, it is considered by some of the authorities that the object of the statute, so far as lands are concerned, was to abrogate parol titles, and that this was sufficiently accomplished by a memorandum of the promise to convey the land, to be signed by the vendor, without requiring the other terms of the agreement to be stated."

The statute of Alabama, under which *Nelson v. Shelby Mfg. & I. Co., supra,* was decided, expressly provided that the consideration must be stated in the memorandum. Our statute contains no such provision. It provides, not that the contract itself must be in writing, but that "some note or memorandum thereof" must be.

In New York, under a statute which required that the consideration of the memorandum be expressed in the

writing, it seems to have been held that the terms of payment must be found therein. The law of 1863 (p. 802, ch. 464) having omitted the provision requiring the consideration of the promise to be expressed in the writing, it was held that the writing was sufficient without stating the consideration. *Finkelstein v. Kessler,* 84 N. Y. Supp. 266. The memorandum in question, which was signed by Mr. Hotovy, recites that Mr. Ruzicka has purchased the land in question; that the agreed price is $5,500; that all payments are to be made within five years; that $100 has been paid; that for four years the payments are to be at $900 a year, and the fifth year payment is to be $1,200, and that the rate of interest on the deferred payments is to be 5 per cent. It is therefore lacking in no particulars, unless it be in respect that it does not specify when the remainder of the consideration is to be paid, nor when the transfer is to be made, nor whether the deferred payments are to be secured. These matters may be proved by parol evidence under our statute. Ordinarily, parties to such transactions do not draft their own conveyances, and, as such conveyances must be executed with certain prescribed formalities, it is to be presumed that the parties intended, and the contract contemplated, that the conveyance should be executed and the transaction consummated at once; that is, as soon as it would be reasonably convenient for the parties to do so.

$100 of the purchase price was advanced as earnest money. The times for payments amounting to $4,800 of the $5,500 purchase price were fixed by the memorandum. As to the time of paying the remaining $600 nothing is said in the memorandum. The contract was not void for this omission, as above shown. If no time of payment of the consideration is expressed in a contract of purchase, payment is due upon delivery.

3. It is insisted that the finding that the contract was that the deferred payments should be secured by mortgage on the land is not supported by the evidence. Without such contract, the vendor must rely upon the personal

responsibility of the purchaser. The defendant is not prejudiced by this part of the decree of the trial court, and the plaintiff has not appealed therefrom.

4. The plaintiff had deposited in court the $600 for the cash payment, and the court by its decree required a further deposit to be made by him, and the execution and deposit of securities within a time fixed by the court in the decree. After the defendant had given his bond for appeal, which superseded the decree of the trial court, the plaintiff withdrew the deposit which he had made with the clerk of the court in obedience to the decree, and has failed to comply with the terms of the decree in the other respects mentioned. It is insisted that the plaintiff has "thereby abandoned all right accruing to him under the decree." This contention cannot be sustained. The defendant, by taking his appeal and filing his supersedeas bond, has suspended the operation of the decree. The time allowed plaintiff to comply with the terms of the decree has thereby been extended. When the decree becomes again enforceable in the district court, the plaintiff will have the time allowed in the decree in which to comply with these terms.

5. The decree does not prescribe in express terms when the interest upon the deferred payments shall begin. Of course, the contract contemplated that the purchaser should pay interest from the time his purchase was completed and he became entitled to possession of the premises. This sufficiently appears from the decree in which the plaintiff is required to execute and deposit his notes for these payments, bearing interest at five per cent. This cannot be construed otherwise than that interest will run from the date of the notes. At that time, by the terms of the decree, the plaintiff is to have possession of the premises.

The decree of the district court is

AFFIRMED.

CHARLES O. LOBECK V. STATE OF NEBRASKA, EX REL. NEBRASKA BITULITHIC COMPANY, ET AL.

FILED NOVEMBER 2, 1904. No. 13,950.

1. Cities: CLAIMS. A partial estimate made by the city engineer of the city of Omaha on a paving contract, and reported by him to the board of public works and the city council for approval and allowance, is a claim against the city within the meaning of section 33 of the city charter.
2. Appeal. By complying with the provisions of that section, a taxpayer may appeal from the order of the city council approving and allowing such a claim to the district court.
3. ———: EFFECT. When an appeal is perfected it suspends the order of the council and during its pendency the comptroller is not required to deliver the warrant for the payment of the estimate to the claimant.
4. ———: MANDAMUS. During the pendency of such appeal, mandamus will not lie to compel the delivery of the warrant.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Reversed with directions.*

C. C. Wright, W. H. Herdman and *A. G. Ellick,* for plaintiff in error.

W. J. Connell, contra.

BARNES, J.

The Nebraska Bitulithic Company, in the spring of 1904, entered into a contract with the city of Omaha to repair its asphalt pavements. The company proceeded with the work, and partially completed the repairs. By the terms of the contract, it was provided that payments should be made on estimates of the city engineer from time to time, and in such amounts as might be found due by such estimates. One estimate was made and the amount due thereunder paid, but when the second estimate was reported by the engineer to the board of public works, and by that body to the mayor and city council, Charles E. Fanning,

a citizen and taxpayer of the city, notified the council that the work had not been done according to the contract, and that he would appeal from any allowance made on said estimate. The board of public works, the city council and the mayor approved the estimate, and made an allowance of $3,991, the amount due thereunder, and the comptroller and the mayor signed a warrant therefor. Fanning thereupon gave notice and took the necessary steps to perfect an appeal from such approval and allowance to the district court, under the provisions of section 33 of the city charter. The comptroller refused to deliver the warrant to the company and the First National Bank of Omaha, its assignee, until the time for an appeal had expired. Thereupon the plaintiffs commenced this action in mandamus to compel the comptroller to deliver the warrant, notwithstanding the attempted appeal. The trial in the district court resulted in an allowance of a peremptory writ of mandamus, commanding the comptroller to deliver the warrant to the relators. From that judgment he prosecutes error, and thus presents for our consideration the question whether the right of appeal to the district court in such a case is granted by the terms of the city charter. The section in question reads as follows:

"Before any claim against the city, except officers' salaries and interest on the public debt, is allowed, the claimant or his agent or attorney shall verify the same by his affidavit, stating that the several items therein mentioned are just and true and the services charged therein, or articles furnished, as the case may be, were rendered or furnished as therein charged and that the amount therein charged and claimed is due and unpaid, allowing all just credits, and the city comptroller and his deputy shall have authority to administer oaths and affirmations in all matters required by this section. All claims against the city or water board must be filed with the city comptroller. And when the claim of any person against the city is disallowed, in whole or in part, by the city council or water board, such person may appeal from the decision

of the said city council or water board to the district court of the same county by causing a written notice to be served upon the city comptroller of said city, within twenty (20) days after making such decision, and executing a bond to such city, with sufficient surety, to be approved by the city comptroller, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjuged against the appellant. Upon the disallowance of any claim, it shall be the duty of the city comptroller of said city to notify the claimant, his agent or attorney, in writing, of the fact within five (5) days after such disallowance. * * * Any taxpayer may likewise appeal from the allowance of any claim against the city or water board by serving a like notice on the city comptroller within twenty days and giving a bond similar to that provided for in this section."

The relators contend that the section above quoted has no application to cases like the one at bar. In other words, that the estimate on which the allowance was made was not a claim within the meaning of said section. We find ourselves unable to assent to this proposition. The law is broad and sweeping in its terms, and was evidently intended to include all claims of every kind and nature requiring for their payment the withdrawal of money from the city treasury, except, of course, officers' salaries, interest on the public debt, and claims for torts, which are presented and prosecuted in a different manner. Its purpose was to safeguard the public funds, and by an easy and inexpensive method enable a taxpayer to prevent fraud and extravagance in conducting the business of the city. It seems clear that it was intended to apply to claims due on contract work, as well as all other demands against the municipality, and should receive such judicial interpretation and construction as will render it effectual for that purpose. We are unable to distinguish any difference between a claim made by a contractor on an estimate of the city engineer for a partial compliance with his contract, and any other contract claim against the city. Sec-

tion 101*a* of the city charter, which defines the powers and duties of the board of public works, among other things, provides:

"It shall be the duty of such board of public works and it shall have power to make contracts on behalf of the city for the performance of all such works and the erection of such improvements as may be ordered by the mayor and council, but only with the approval of the mayor and council. * * * It shall also be the duty of said board to approve the estimates of the city engineer, which may be made from time to time, of the public work, as the same may progress; to accept any work or improvement made when the same shall be fully completed according to contract, subject, however, to the approval of the mayor and council."

With reference to the duties of the city engineer, it is provided in section 93 of the charter, as follows:

"He shall make all necessary surveys, plans, specifications and estimates, of all public works of the city and their maintenance and repairs. The city engineer shall make all temporary and final estimates of public works under contract, and report the same to the board of public works, who shall submit the same to the mayor and council with their recommendation."

Under the provisions of section 94 of the charter, it is also made the duty of the city engineer to inspect public work, and, if found to be properly done, to accept the same and forthwith report his acceptance to the board of public works, and, when the contract so provides, he may accept such work in sections. But in every case he must report his acceptance to the board of public works, which, in turn, reports the same to the mayor and city council for final approval and acceptance. So it is clear that no payment can be made for any public work until the claim therefor has been allowed by the city council, and approved by the mayor, and the amount thus found thereby due is ordered paid. The amount due on an estimate is as much a claim as an amount due on a contract without an esti-

mate. In *State v. District Court,* 90 Minn. 457, 97 N. W. 132, a case very much like the one at bar, and where the same contention that the amount of an estimate was not a claim was made, the court said:

"It is urged that relator has presented no claim to the city council for their action, that it never submitted to the jurisdiction of that body, and is now being forced into court without its consent. It appears from the record that, after the relator had partly performed its contract, some officer representing it requested the proper city authorities to make an estimate of the amount of work performed. The request was complied with and estimate made, which was thereafter presented to the council for their action. It was allowed by the council, and relator demanded of the city clerk the issuance of an order on the city treasurer for the amount. That relator occupied the position of a claimant with a claim against the city, there can be no serious doubt. It asserted a claim under the contract for the amount claimed to be due, and the city council duly allowed it. If anything further is essential to constitute a claim within the meaning of the charter, we are unable to point it out."

It is contended, however, that, because the relator did not verify the estimate in question by affidavit, stating "that the items therein alleged are just and true, and the services charged therein, or articles furnished, as the case may be, were rendered or furnished as therein charged, and that the amount therein charged and claimed is due and unpaid, allowing all just debts and credits," the claim was not included within the provisions of section 33, above quoted. We do not so understand it. The allowance of the estimate by the city council, and the approval of the mayor, was required before a warrant could be drawn for its payment, and it is our opinion that such estimate, when presented, should have been accompanied by the verification of the relator, as set forth above. The mere fact that it had been the custom to disregard this charter provision when such estimates were presented does not

change the nature of the indebtedness, or render it any less a claim against the city within the meaning of the law. The council, by acting on the estimate without requiring the affidavit above mentioned, could not deprive a taxpayer of his right of appeal. It is urged that it would be a calamity to the city of Omaha to hold that an appeal could be taken from the allowance of a partial estimate under a contract for paving; that it would make rival contractors, in the place of the city engineer and the board of public works, the arbitrators of the proper execution and completion of public work done under contract with the city. We think that counsel is unnecessarily alarmed about this matter. The provisions of the city charter require certain formalities to be observed by those having claims against the city, precedent to the issuance of a warrant in payment of the same. Persons entering into contracts with the city are bound to know this fact, and take it into consideration. The charter provisions become a part of such contracts, and the remedy there pointed out to secure payment must be pursued. The fact that a strict compliance with the law would work a hardship in some cases does not authorize the courts to nullify the provisions of the charter; we must declare the law as we find it. If to comply with the provisions of the charter is difficult or onerous, or results in injury to the city and individuals, the remedy is with the legislature, and not with the courts. Relief should be sought by amendment, and not in nullification.

It is therefore our opinion that the estimate in question was a claim within the meaning of section 33 of the city charter, and that the taxpayer had a right to appeal from the approval and allowance thereof by the city council to the district court. It appears that an appeal was duly perfected. The effect of the appeal was to at least suspend the order of the board during its pendency, and while the case was pending and undisposed of in the district court mandamus would not lie to compel the delivery of the warrant.

For these reasons, the judgment of the district court is reversed and the cause remanded, with directions to dismiss the action.

REVERSED.

IN THE MATTER OF THE ESTATE OF WILLIAM FREDERIC PARKER, DECEASED.

FILED NOVEMBER 2, 1904. No. 13,596.

Estate of Decedent: SALE: REVIEW. In the conduct of proceedings for the sale of real estate for the payment of debts of a deceased person, the principal duty of a district court is to conserve the estate, and its orders and judgments to that end ought rarely to be disturbed, and never unless they appear to have been mistakenly made, or disclose an abuse of discretion unjustly injurious to a party in interest.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Gaines, Kelby, Storey & Martin and *I. R. Andrews,* for appellant.

Charles A. Goss and *J. W. Hamilton, contra.*

AMES, C.

Executors of the will of William Frederic Parker, deceased, obtained from the district court a license for the sale of certain real property belonging to the estate of the testator for the payment of his debts. Sales of a large number of tracts were accordingly made and reported to the court. As a part of their report, the executors recited that there were several tracts that were bid off at the sale for sums, in their opinion, below their value, among them being five lots in an addition to the city of Omaha for which the appellant Isaac R. Andrews was bidder, and as to such tracts they recommended that the bids be not accepted, but a resale ordered. A like representation was also made

by a minor son of the testator by a guardian *ad litem*. Andrews bid at the sale an aggregate sum of $35 for the five lots, and, on the coming in of the report, another person offered, in case of a resale, to bid $50 for them. In view of the fact that other tracts were required to be advertised, so that the resale of these lots would occasion no appreciable additional expense, the court granted the application of the executors and minor, and Andrews appealed from the order to that effect to this court.

The principal duty of the district court in such cases is to conserve the estate of the decedent, and, in our opinion, its orders and judgments to that end ought rarely to be disturbed, and never unless they appear to have been mistakenly made, or disclose an abuse of discretion unjustly injurious to a party in interest. Such a condition of affairs is not disclosed by the record, and we recommend that the order appealed from be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the order appealed from be

AFFIRMED.

WILLIAM MCGINLEY V. ANNA M. WIRTHELE.

FILED NOVEMBER 2, 1904. No. 13,635.

Replevin: ANSWER. When a defendant in replevin qualifies a general denial in his answer by pleading specially that the title to the property in dispute is in him, he waives the technical defense that he was not in possession of it at the beginning of the action.

ERROR to the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed.*

W. F. Moran, for plaintiff in error.

W. W. Wilson, contra.

AMES, C.

The plaintiff in error, McGinley, claims to have purchased some chattel property of August Wirthele on the 24th day of February, 1901, and to have sold it on the same day, and delivered it to his vendee. On the 12th day of March following, this action in replevin for a recovery of the property was begun against him by the defendant in error, the wife of the vendor, her husband in the meantime having absconded. The return of the officer recited that the property in dispute could not be taken under the writ, and the action proceeded as one for damages. Issues were made up and tried to the court without a jury, the result being a judgment for the plaintiff.

The defendant below prosecutes error, contending, first, that the judgment ought to be reversed because the gist of the action of replevin is the unlawful detention of the property, and that at the time this suit was begun, and for two weeks previously, the chattels in dispute were not, and had not been, actually or constructively in his possession. This defense is, however, in a measure technical, and one which a defendant may waive, if he chooses so to do, and we think that in this case he did so. Instead of relying upon a general denial, as he might have done if he had seen fit, he expressly qualified that defense by pleading specially that he had purchased the property for value and in good faith of the husband, and that the plaintiff, by her conduct in permitting the latter to take and retain possession of the same and represent himself to be the owner and entitled to dispose of it, was estopped to allege title in herself.

By this answer the plaintiff in error tendered a distinct issue of title, and so made the question of possession immaterial. It does not lie in his mouth to say that the court has tried, at his instance, a question of which, because of circumstances within his knowledge and existing at the time of the beginning of the suit, it had not jurisdiction. The case falls precisely within the rule announced

by this court in *Flynn v. Jordan,* 17 Neb. 518, which was also an action in replevin in which the issues were, in this respect, exactly similar to those in the case at bar.

A second contention of the plaintiff in error is that the evidence is insufficient to establish ownership in the wife, who was plaintiff below. But this is an action at law, in which the findings of fact have the same rank and importance as the verdict of a jury, and an examination of the record fails to convince us that the conclusions of the trial judge were, in the language of the decisions, "clearly" or "manifestly" wrong. And, besides, although we do not wish to be understood as holding that a plea of estoppel is in all cases so clearly inconsistent with a denial of title as to preclude the latter defense, yet in this case the pleading gave the alleged estoppel such exclusive prominence as to amount very nearly, if not quite, to an admission of actual ownership in the plaintiff, which could be defeated only by the matter *in pais.* It cannot be, and we do not understand is attempted to be, seriously contended that the defense of estoppel was made out. Whatever may have been the conduct of the plaintiff with respect to the property, it is not shown, or attempted so to be, that it came to the knowledge of the defendant or influenced him in any way at or before the time he made his alleged purchase.

For these reasons, we recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

WILLIAM H. BUTTERFIELD ET AL. V. COMMERCIAL CATTLE COMPANY OF NEBRASKA.

FILED NOVEMBER 2, 1904. No. 13,555.

Lease: STATUTE OF FRAUDS. A written memorandum, signed by the party making the lease for a leasehold contract of more than one year, is competent evidence of a valid contract, when such written offer has been accepted by the lessor.

ERROR to the district court for Pierce county: JOHN F. BOYD, JUDGE. *Reversed with directions.*

M. D. Tyler and *Douglas Cones,* for plaintiffs in error.

Benjamin Lindsay and *Barnhart & Free, contra.*

OLDHAM, C.

This was a suit in forcible entry and detainer. There was no dispute as to the questions of fact involved, and at the close of the testimony the court directed a verdict of guilty and rendered judgment upon the verdict; and to reverse this judgment defendant brings error to this court.

The undisputed facts in the record are that for several years the defendant in the court below had occupied a large tract of land owned by the plaintiff cattle company in Pierce county; that, prior to April 20, 1902, defendant had occupied these premises, known as "The Ranch," under a written lease for three years, which expired on that date; that Mr. E. de La Chappelle was the manager of the plaintiff cattle company, and resided in Ottawa, Illinois. That Mr. B. W. Woolverton, a real estate agent who resided in Pierce county, had exercised a limited agency over plaintiff's lands, and had collected the rents from defendant for several years prior to the controversy. The year before the expiration of the last written lease, defendant, desiring to procure a further lease of the premises, applied to Mr. Woolverton for terms on which his lease might either

be renewed or another one entered into. Mr. Woolverton communicated this information by letter to the manager of the company, and, in answer to his letter, received the following communication:

"OTTAWA, ILL., April 30th, 1901.

"*B. W. Woolverton, Pierce, Nebraska*—DEAR SIR: I have tried to formulate a plan for the best result to be obtained from the ranch. I have carefully noted the report that you sent to me and thank you for the same. To-day, if you can induce Mr. Butterfield to take a three years lease at $850 per annum, reserving the right of selling the parcels not connected with the main body of land, I will accept these terms. As far as the repairs are concerned, the clause adopted by both parties in the old lease ought to be maintained. I wish you can succeed in obtaining Mr. Butterfield's consent to the above conditions and remain,

"Yours truly, E. DE LA CHAPPELLE,
"Manager for Commercial Cattle Company."

When Mr. Woolverton received this communication, he notified Mr. Butterfield of such fact, and showed him the letter, and prepared a new lease, in duplicate, of the premises for three years, including all the terms specified in the letter from plaintiff's manager. Defendant signed each of the duplicate copies of this lease, retained one, and Mr. Woolverton mailed the other to plaintiff's manager, who retained his copy of the duplicate lease for about two weeks, and subsequently declined to sign the same, and served notice on the defendant of the termination of his tenancy, and at the expiration of the notice, defendant having declined to surrender possession, plaintiff instituted the instant case.

It is urged in support of the judgment of the trial court that the lease having been signed by the lessee alone is invalid under the statute of frauds. If defendant's right stood alone upon the written lease which he executed, and which plaintiff subsequently refused to sign, we think this

contention would be well founded. Section 5, chapter 32, of the Compiled Statutes, 1903 (Annotated Statutes, 5954), provides as follows: "Every contract for the leasing for a longer period than one year from the making thereof, or for the sale of any lands, or any interest in lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made." In short, this statute of frauds, which is a statute of evidence, requires that a valid contract of leasehold for more than one year can only be established by a written contract or some note or memorandum thereof in writing, signed by the party who makes the lease. But the question arises, whether the letter from plaintiff's manager is not a memorandum in writing signed by the duly authorized agent of the plaintiff, by which this leasehold contract may be proved. This court has held in numerous decisions that a memorandum may take the form of a written offer signed by the party who is to make the sale or the lease of the land, and when this offer is accepted by the other party there is a valid lease or sale, as the case may be. *Gartrell v. Stafford,* 12 Neb. 545; *Robinson v. Cheney,* 17 Neb. 673; *Gardels v. Kloke,* 36 Neb. 493.

We think there can be little doubt that under the direction of the letter of plaintiff's manager, before set out, Mr. Woolverton would have been fully authorized to have prepared and signed this lease on behalf of plaintiff, and that, if he had done so, plaintiff would have been bound by the contract. But, in any event, when the lease was prepared, it was signed by defendant, and his signature to the lease ratified the terms of the memorandum which were embodied in the contract. The last clause in the letter before set out is: "I wish you (Woolverton) can succeed in obtaining Mr. Butterfield's consent to the above conditions." In accordance with this direction, Woolverton did obtain Butterfield's consent to every condition set forth in the memorandum; and by this act we think a valid agreement was consummated, and that this agreement is

properly evidenced by a memorandum in writing signed by the party by whom the lease was made.

We therefore conclude that the learned trial judge was in error in directing a verdict of guilty, and, as there is no disputed fact in the record, we recommend that the judgment of the district court be reversed and the cause remanded, with directions to the trial court to dismiss plaintiff's petition.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to the trial court to dismiss plaintiff's petition.

REVERSED.

FAYETTE I. FOSS, APPELLEE, V. JAMES W. DAWES, APPELLANT.*

FILED NOVEMBER 2, 1904. No. 13,610.

1. Contribution for payment of partnership debts cannot be enforced until there is a final settlement of all the affairs of the partnership.
2. Evidence examined, and *held* insufficient to show a final settlement of partnership affairs.

APPEAL from the district court for Saline county: GEORGE W. STUBBS, JUDGE. *Reversed with directions.*

Robert Ryan, for appellant.

Fayette I. Foss, W. G. Hastings and *R. D. Brown, contra.*

OLDHAM, C.

In November, 1879, James W. Dawes and Fayette I. Foss entered into a partnership, and, as such, engaged in

* Rehearing denied. See opinion, p. 611, *post.*

the "law and loan" business at Crete, Nebraska. On May 12, 1890, plaintiff Foss began an action in the district court for Saline county for a dissolution of the partnership and a winding up of its affairs. From the record before us it appears that a receiver was appointed, and that the matter of the indebtedness of the partners to the partnership was referred to Judge Broady, who, as referee, reported that the defendant was indebted to the partnership in the sum of $25,912.20, and plaintiff was indebted to the partnership in the sum of $20,782.27. This report was filed on May 19, 1892, and was confirmed by the court on June 1, 1892. Claims in excess of $60,000 were filed with the receiver by the creditors of the partnership. This original suit is still pending. On January 17, 1900, the plaintiff filed a supplemental petition, in which he sets forth numerous items which he alleges he has paid for and on behalf of the partnership, and asks judgment against the defendant for contribution. There was an answer, denying liability on the items, a plea of former adjudication and the statute of limitations. A trial was had that resulted in a judgment against the defendant, from which he appeals to this court.

The main contention presented in this court is that "no action at law or in equity lies in favor of one partner against another, founded upon partnership transactions, until there has been a settlement of all indebtedness of the partnership with its creditors"; or, in other words, one partner cannot have contribution from the other before final settlement of all partnership business. This proposition is obviously sound, for the amount which the one partner is entitled to, if anything, cannot be known until the partnership affairs are settled. Hence, the relation of debtor and creditor between partners does not arise until the affairs of the partnership are wound up and a balance struck. Such balance is to be struck after all partnership affairs are settled, and not while they are being wound up. *Gleason v. White*, 34 Cal. 258; *Simrall v. O'Bannons*, 7 B. Mon. (Ky.) 608; *Lower v. Denton*,

9 Wis. *268; *Austin v. Vaughn,* 14 La. Ann. 43; *Oglesby v. Thompson,* 59 Ohio St. 60; *Ashley v. Williams,* 17 Ore. 441; *Hall v. Clagett,* 48 Md. 223; *Slater, Myers & Co. v. Arnett,* 81 Va. 432; *Stanberry v. Cattell,* 55 Ia. 617; *Hill v. Beach,* 12 N. J. Eq. 31. This is conceded by the appellee. In his brief, on page 5, he says: "But contribution for payment of partnership debts is not enforced till final settlement." The record in this case does not show a final settlement. There was a receiver of this partnership estate with whom were filed numerous claims against the partnership, which were allowed. A number of these claims are included among the items of the supplemental petition, but, on the other hand, there are many—amounting to over $15,000—which are not so included. There is nothing in the pleadings or in the evidence that purports to show that this hearing was on or after final settlement, but, on the contrary, the evidence shows it was not. The plaintiff, on cross-examination, testified as follows:

Q. What was the amount of the claims filed against the estate? How much was the aggregate amount?

A. I cannot tell you exactly; the record shows.

Q. You do not know how much is unpaid?

A. I do not.

Q. Do you know how many creditors there were?

A. I cannot tell you that. I know that the most of them have been paid and there is a little that is not yet wiped out, but I cannot tell how much.

In *Oglesby v. Thompson, supra,* the court said:

"It is always the duty of a court in a suit for an account to state it, if possible, from the evidence offered; but, if this is not possible according to the rules by which issues of fact are determined, it can do but one thing—dismiss the action for an account. An ascertainment of the state of the accounts is a necessary predicate to the rendition of any judgment in favor of the plaintiff."

In the judgment appealed from is the finding: "Court finds that all partnership debts are paid or barred by the statute of limitations." This finding is based upon noth-

ing, neither pleading nor evidence, and it is difficult to understand upon what theory it was interpolated in the record. If, as a matter of law, the learned trial court concluded that the claims were barred by reason of the lapse of time from the filing thereof, it was wrong. These claims, when allowed by the court, are, in effect, judgments against the partnership assets, and the statute of limitations does not *begin* to run against them so long as the suit into which they were brought is pending.

There are some other questions presented by the record, but, as the one discussed disposes of the case, it would serve no useful purpose to investigate them now.

We therefore recommend that the judgment of the district court be reversed, with directions to dismiss plaintiff's supplemental petition.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, with directions to dismiss plaintiff's supplemental petition.

REVERSED.

The following opinion on motion for rehearing was filed February 22, 1905. *Motion denied:*

PER CURIAM: It is ordered and adjudged that the order heretofore entered directing the dismissal of the plaintiff's supplemental petition be vacated and set aside, and that the judgment be reversed, and the cause be, and hereby is, remanded to the district court for further proceedings not inconsistent with the opinion heretofore filed in this case.

It is further ordered that the motion for a rehearing be, and the same hereby is, overruled.

MOTION DENIED.

IN RE MINNIE GREASER ET AL.

FILED NOVEMBER 2, 1904. No. 13,620.

Habeas Corpus: APPEAL. The judgment of a district court in a proceeding in habeas corpus will not be reviewed by this court on appeal.

APPEAL from the district court for Colfax county: JAMES A. GRIMISON, JUDGE. *Dismissed.*

George W. Wertz, for relator.

W. I. Allen and *E. T. Hodsdon, contra.*

OLDHAM, C.

This was a proceeding in habeas corpus in the district court for Colfax county, Nebraska. There was a judgment for the relators in the court below, which respondents seek to have reviewed by this court on appeal. No motion was filed for a new trial in the court below, nor was a petition in error filed in this court. This leaves but one question to determine, and that is as to the form of the procedure under which this court will review the judgment of a district court in habeas corpus. This question was before us in the case of *In re Van Sciever*, 42 Neb. 772, and, after a careful examination of the proper method of review of causes of this nature by this court, we determined that proceedings in habeas corpus were civil in their nature and could, and would, be reviewed here on error proceedings, but not on appeal. We think the rule well supported in principle, and therefore recommend that the appeal in the case at bar be dismissed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the appeal in the case at bar is

DISMISSED.

FREMONT TELEPHONE COMPANY V. CHARLES KEELER.

FILED NOVEMBER 2, 1904. No. 13,632.

Evidence examined, and *held* not sufficient to sustain the judgment of the district court.

ERROR to the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

Courtright & Sidner, for plaintiff in error.

F. W. Button, contra.

OLDHAM, C.

This was a suit for personal injuries, instituted by plaintiff in the court below against his employer, the Fremont Telephone Company. There was a trial to a jury in the court below, and verdict for plaintiff for $150, judgment on the verdict, and defendant brings error to this court.

To dispose of the cause it will only be necessary to examine one of the alleged errors called to our attention in defendant's brief, and that is that the evidence is not sufficient to sustain the judgment. The facts underlying the controversy, as testified to by the plaintiff in the court below, are substantially as follows: Plaintiff, at the time of his injury, was a second lineman in the employ of the defendant telephone company. He had been engaged in stringing telephone wires on the poles of the company in the city of Fremont for about two weeks before the accident complained of. He was 23 years of age, and had done some work for the Bell Telephone Company before his employment by the defendant. On the day preceding the injury, defendant's foreman told plaintiff to prepare to string a telephone line along the side of a brick building in Fremont. To do this plaintiff had to procure a ladder, and drive wooden plugs between the bricks on the side of the building to support the attachments necessary to hold

the wires. The foreman seems to have given no instruction except as to the height at which the wires were to be strung, and to ask plaintiff if he could get a ladder to do the work. On the day of the injury, plaintiff borrowed a ladder from a paint shop, and placed it against the side of the building for the purpose of driving in the plugs; he ascended for about 15 feet, and says that, after he got to the top of the ladder, the foreman tossed him a plug, which he was to drive between the bricks. He placed one foot on the sill of a second-story window in the building and the other on the top of the ladder, and undertook to drive the plug between the bricks with a hand-ax, when he lost his balance and fell to the ground, sustaining the injury of which he complains.

The negligence alleged against the defendant in plaintiff's petition was, in substance, that he was without experience in stringing telephone wires on brick buildings, and that he should have been warned of the extra hazard of such an undertaking by defendant's foreman. We must confess, after a careful examination of plaintiff's testimony, that we are wholly unable to see any hidden or lurking danger in the occupation in which he was engaged, that required special instruction to apprise him of such fact, from either his employer or the foreman who stood in the place of the employer. He was not working with either defective or dangerous implements. He himself borrowed the ladder on which he ascended to his place of duty. There was no hidden defect, either in the ladder on which he stood, or in the hand-ax with which he drove the plugs, or in the plug furnished him, that in any manner contributed to the injury. It is not claimed that he was either blind, or insane, or of such very tender years as to be incapable of understanding the danger which must have been obvious to one having eyes to see, when he undertook to drive the plug. We therefore conclude that there is no evidence in the record tending to show any breach of any duty owed by the master to the employee, and, although we doubt not that plaintiff received a pain-

ful injury from the accident, his misforture is not, by any evidence in the record, connected with any negligent act on the part of his master.

We therefore recommend that the judgment of the district court be reversed and that the cause be remanded for further proceedings according to law.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

STATE OF NEBRASKA, EX REL. GUSTAV PRITSCHAU, V. S. H. SORNBORGER.

FILED NOVEMBER 2, 1904. No. 13,593.

Exceptions, Bill of: MANDAMUS. Where an *ex parte* order extending the time for the presentation of a bill of exceptions has been found upon a hearing to have been wrongfully and fraudulently obtained, a district judge may set the order aside, and refuse to settle and allow the bill because not presented within the statutory time. In such case he will not be compelled by mandamus to settle and allow the bill.

ORIGINAL application for a writ of mandamus to compel the allowance of a bill of exceptions. *Writ denied.*

C. E. Holland, for relator.

J. J. Thomas, contra.

LETTON, C.

This is an original action in this court for the purpose of compelling the Honorable S. H. Sornborger, lately judge of the district court for Seward county, to settle, allow and

sign a bill of exceptions in an action pending in said court. A summary statement of the allegations of the petition is that, on the 16th day of February, 1903, an action was pending in the district court for Seward county, wherein Gustav Pritschau was plaintiff and Rice Brothers & Nixon and others were defendants, wherein the W. J. Perry Live Stock & Commission Company and W. E. Langworthy, two of the defendants, recovered a final judgment against the plaintiff dismissing his action; that the presiding judge, the Honorable S. H. Sornborger, granted 40 days from the rising of the court to prepare and present a bill of exceptions; that, afterwards, upon a showing of diligence, said judge made an order extending the time in which to prepare and serve the bill of exceptions to 80 days from the rising of the court; that the term of court at which the action was tried adjourned *sine die* on the 16th day of May, 1903; that the proposed bill of exceptions was, on the 6th day of July, served upon the attorney of record for said defendants, who retained the same until after the 15th day of August, 1903, and on the 27th day of August, 1903, it was found upon the desk in the office of C. E. Holland, one of the attorneys for plaintiff Pritschau, without any amendments being suggested or proposed; that said proposed bill was presented to the respondent, S. H. Sornborger, for settlement and allowance within the time required by law; that said judge took away the said proposed bill and never returned same, but that, afterwards, in December, 1903, it was found in the office of J. J. Thomas, the attorney for said defendant, and was again presented by plaintiff's attorney to the said respondent, Sornborger, for settlement and allowance, on December 15, and that, afterwards, on the 24th day of December, respondent declined and refused to settle or allow said bill. The petition prays for a peremptory writ of madamus to compel the respondent to settle and allow the bill of exceptions. The answer of the respondent, after admitting the facts in relation to the rendition of the judgment, the allowance of the 40 days to prepare and present

the bill, and the making of the order extending the time for an additional 40 days, alleges that the bill of exceptions was presented to him in November, 1903; that it appeared that it had been tendered to adverse counsel on July 13, 1903, and service refused because it had not been served within the original 40 days allowed by the respondent; that, when the bill was presented to him for allowance by the relator's attorney, he observed that objection had been made to its allowance, and that he refused to consider the allowance of same without notice to the opposing counsel; that the matter of allowing and settling the bill of exceptions came on finally to be heard on the 24th day of December, 1903, which was a day of the regular November, 1903, term of the district court for Seward county, on the motion of the defendants to revoke, cancel and annul the order granting plaintiff an additional 40 days within which to prepare and serve said bill, and upon other objections to its allowance, at which hearing all of the parties in interest were represented by counsel; that upon a full hearing of the facts the respondent concluded that there was an entire lack of diligence on the part of the relator, and a clear case of gross negligence, and respondent therefore withdrew, canceled, revoked and annulled the former order granting an additional 40 days within which to prepare and serve the bill of exceptions; that no proceedings to reverse said order have been instituted.

No evidence was presented in this court, other than the original proposed bill of exceptions with the endorsements and memoranda written thereupon; but it sufficiently appeared from the statements and admission made upon the hearing that the facts were substantially as alleged in the pleadings.

It appears that the motion to set aside the order granting additional time was made upon the grounds that the defendant had no notice of the application for additional time; that no showing of diligence had been made; that the reporter had completed the bill of exceptions and

offered to deliver it to the plaintiff long prior to the expiration of the first 40 days allowed; that the obtaining of the order of extension was a fraud upon the court, and that it was solely owing to the plaintiff's neglect that the bill was not served within the first 40 days. At the hearing upon the motion to vacate the order, both parties appeared and were represented by counsel, and evidence was taken by the court, upon consideration of which an order revoking the order of July 3 was entered. It appears, then, that the district judge found at the hearing that when he made the order extending the time he had been imposed upon, and that upon ascertaining that fact he set aside the order made and refused to settle the bill of exceptions.

This he had a perfect right to do. It would be strange indeed if a judge who found he had been deceived in making an *ex parte* order extending the time to present a bill of exceptions could not deprive the offending party of any benefit from an order thus obtained, by refusing to give him the benefit of his wrongdoing upon an application to settle and allow the bill. Courts and judges are not thus impotent.

The matters set forth in the answer and the facts admitted constitute a good defense, and the respondent was justified in his refusal to settle the bill of exceptions.

The writ should be refused and proceeding dismissed at relator's costs.

By the Court: For the reasons stated in the foregoing opinion, the writ is refused and the proceeding dismissed at relator's costs.

WRIT DENIED.

CHARLES A. CLINE V. S. H. DEXTER, ADMINISTRATOR.

FILED NOVEMBER 2, 1904. No. 13,451.

Witness: COMPETENCY. Where an administrator introduces in evidence a letter from the adverse party giving a narrative of the transaction with the deceased party upon which the action is based, the evidence of the adverse party as to the transaction recited in the letter upon his own behalf is not incompetent under the provisions of section 329 of the code, and it is error to exclude the same.

ERROR to the district court for Merrick county: JAMES A. GRIMISON, JUDGE. *Reversed.*

John C. Martin, for plaintiff in error.

W. T. Thompson, contra.

LETTON, C.

This action was brought by the administrator of the estate of Samuel Cline, deceased, to recover from the Merrick County Bank the balance of a deposit due from said bank to Samuel Cline at the time of his death. The Merrick County Bank answered, disclaiming any interest in the money on deposit except as a depository, brought into court the amount of the deposit, and alleged that the same is claimed both by the estate of Samuel Cline, deceased, and by Purington & Cline, a copartnership. Purington & Cline intervened, averring that they were a partnership engaged in the live stock commission business at South Omaha, Nebraska; that, from the 26th day of February, 1902, until his death, Samuel Cline was their agent for the purpose of purchasing and shipping stock for them at Clarks, Merrick county, Nebraska; that for the convenience of their customers they placed certain money with the Merrick County Bank from time to time during said agency, subject to the order of Samuel Cline, for the purpose of purchasing and shipping stock for them, and for

no other purpose; that, on the 4th day of May, 1902, when Samuel Cline died, there was on deposit in said county $262.68 of their funds, and they pray judgment for that sum, and that the money tendered to be paid to them. A general denial was filed to these allegations. Afterwards, Charles A. Cline was substituted as defendant for Purington & Cline. Trial was had to the court, without the intervention of a jury, and the court found that the funds are the personal property of the estate of Samuel Cline, deceased, and adjudged the payment of the same to the administrator. From this judgment Charles A. Cline prosecutes error to this court.

A number of assignments of error have been made, but, since a new trial will be required, it is unnecessary to consider more than one or two of them. It is conceded by plaintiff in error that, since the deposit register of the bank and the passbook of Samuel Cline both show this account to have been carried in the name of Samuel Cline, this is sufficient, in the absence of other proof, to establish *prima facie* a liability of the bank to Samuel Cline, which passed to the estate as an asset. But he contends that such *prima facie* case is founded solely upon a legal presumption, which can be overcome by sufficient competent proof as to the true character of the deposit. With this view of the law of the case we are agreed, and, when sufficient competent proof has been offered by him to overcome the presumption and show that the money was the money of Purington & Cline to the satisfaction of a court or jury, he has made his case.

It is assigned as error that the court erred in not permitting the plaintiff in error to show that the plaintiff in the court below was not the real party in interest. The offer was to show that the widow, as one of the heirs at law, together with the administrator and the guardian of the minor heirs, had made an arrangement with a bank to carry on this litigation in the name of the administrator, and that, if recovery was had by the administrator, the proceeds would be set aside to the widow as her allowance,

and then by her given to said bank to apply upon a debt of her husband. It will be observed that the agreement offered to be shown required the participation of an administrator and a guardian, both of which officers were incompetent to enter into any such agreement; that it further required an order to be made by a county court, setting aside the money to the widow as her allowance, before it could be carried into effect. All this was to be done in the future. The evidence offered was of an illegal agreement, was not competent and would not have proved that the plaintiff was not the real party in interest.

The next error assigned is that the court erred in not allowing the plaintiff in error to testify as to the verbal contract with Samuel Cline under which he received the money. Evidence along this line was excluded by the court under the provisions of section 329 of the code. Plaintiff in error contends, however, that, because the administrator introduced in evidence a letter from Charles A. Cline to the widow of Samuel Cline reciting the original transaction between Samuel Cline and Purington & Cline, he was entitled to give his version of the transaction recited in the letter, upon the theory that, the administrator having offered evidence in regard to the original transaction, the plaintiff in error was also entitled to testify in regard to the transaction. The statutory rule is that where the representative of a deceased party introduces a witness who shall have testified in regard to the transaction with the deceased, the adverse party may also be examined upon the same point. In *Niccolls v. Esterly*, 16 Kan. 32, it was held that, while a party may not testify in his own behalf to a transaction had personally by him with the deceased partner, yet, if he is called by such adverse party to testify as to a part of any such transaction, he may in his own behalf testify as to the whole of such transaction. The burden of proof under the pleadings in that case was upon the defendant. He called as his witness the plaintiff, Esterly, who testified with regard to the transaction with the deceased person. The plaintiff

afterwards testified in his own behalf in reference to the same transactions as to which he had testified at the instance of the defendant. The court say:

"While, if the defendant had so chosen, none of this testimony could have been admitted, yet, having interrogated the plaintiff concerning these matters, and having obtained some of the facts concerning them, he could not thereafter object to the plaintiff's giving all the facts. By introducing part, he opens the door to all. Just as a party may not introduce his own statements in his own behalf, yet if his adversary draws out part of a conversation he may introduce the balance. The principle is general, that where a particular witness, or a certain kind of testimony, may be excluded, if the party who has the right to insist upon the exclusion waives that right, and himself calls the witness, or introduces the testimony, he cannot, after he has obtained what he desires, insist upon the exclusion, so far at least as to prevent a full development of the matters which he has partially presented." This case is cited and followed in *Roberts v. Briscoe,* 44 Ohio St. 596, the Ohio court saying:

"The adverse and surviving party, when compelled to testify by the executor or administrator, cannot reasonably complain; for, though a party, he can then be examined fully in his own behalf on the subject of his examination in chief." To this effect also is *Taylor v. Ainsworth,* 49 Neb. 696.

While we think the rule is clear that, where the adverse party is called by the administrator to testify as to the transaction with the deceased, he is entitled to testify in his own behalf as to the same transaction, yet, the question here presented is somewhat different. The letter which was introduced by the administrator was a narrative of the transaction with the deceased by the adverse party, which was evidently offered by the administrator upon the theory that its contents were an admission against the interest of the person writing it, and that it would aid the administrator in maintaining his theory of the case. It was

offered for the purpose of showing what the transaction actually was, and, though it was not the oral testimony of the adverse party, it seems to us that, since it was his declarations and statements, and was offered as evidence for the purpose of showing the facts as to the transaction, the principle is the same as if he had been placed upon the witness stand by the administrator and had given his testimony for the same purpose. Having offered evidence of the original transaction, the administrator cannot now say that the adverse party should not also testify to it. He cannot take the benefit of the story of the transaction recited in the letter and, at the same time, refuse to give the adverse party the opportunity to testify in regard to the same matter. *Taylor v. Ainsworth, supra; American Savings Bank v. Estate of Harrington*, 34 Neb. 597; *Parrish v. McNeal*, 36 Neb. 727.

We are of the opinion that the evidence offered should have been received, and that its rejection was prejudicial error; and we recommend that the judgment be reversed and the cause remanded for further proceedings.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

WESTINGHOUSE COMPANY V. JOHN L. MEIXEL ET AL.

FILED NOVEMBER 2, 1904. No. 13,614.

1. Sale: WARRANTY: DEFENSE. Where the petition alleges that the plaintiff agreed with the defendant to purchase certain threshing machinery, and that he received the same, subject to an agreement whereby he was to take such machinery upon trial, that it was warranted to be well fitted for the purposes for which it was sold, and that it shall operate to his satisfaction, and that

if not satisfactory he might return the machinery and receive back the notes and personal property given in consideration therefor; and the answer "admits that the property was taken under warranty, and subject to trial, but denies that the terms of said warranty and the conditions of such trial are as alleged in said petition," *Held*, That the defendant is not entitled under such pleadings to prove and rely as a defense upon certain conditions in a written contract between the parties, which is not pleaded in the answer.

2. **Defense:** NEW MATTER. Such a defense is new matter, and must be pleaded before it can be proved.

3. **Waiver.** Under the circumstances set forth in the opinion, *held*, that the plaintiff in error waived the provisions of the written contract with reference to the retention of the machinery after a four-days' trial constituting an acceptance of the same.

ERROR to the district court for Hamilton county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

Mockett & Polk and *John A. Whitmore*, for plaintiff in error.

Hainer & Smith, contra.

LETTON, C.

This cause was brought in the district court for Hamilton county by John L. Meixel and Ina H. Meixel, as plaintiffs, against the Westinghouse Company, defendant. The petition alleges, in substance, that the Westinghouse Company is a New York corporation; that, on February 21, 1902, the plaintiffs at Aurora, Nebraska, entered into a contract with the defendant, whereby they agreed to purchase a Westinghouse thresher engine, separator, stacker and loader, complete; that, by the terms of the contract, the plaintiffs were to execute their notes to the amount of $1,850, pay the freight charges on the new machinery and deliver to the defendant a second-hand engine, loader and separator which were then owned by the plaintiffs, and which were agreed by the parties to be of the value of $700, and, in case plaintiffs finally purchased the prop-

erty, this was to be taken as a payment of that amount upon the property purchased. To induce the plaintiffs to purchase the property, the defendant represented and warranted that it was well and properly constructed, and that it was well fitted for the purpose of threshing, separating and cleaning grain, and that it should work to the satisfaction of the plaintiffs; and it was further agreed that the plaintiffs should receive the property for a reasonable time for the purpose of making a trial of the same, and if it failed to give satisfaction, then notice to be given defendant and an opportunity to make it operate satisfactorily, but, if it failed to perform the work to plaintiffs' satisfaction, they were to return the machinery to the defendant's agent, and the money, property and notes which had been delivered to the defendant should be returned to the plaintiffs, and that the title to the machinery should remain in the defendant until the full consummation of the agreement for the sale and purchase of the same. Plaintiffs allege that they executed the notes, and delivered the machinery mentioned, and took the thresher outfit for the purpose of giving it a trial under the agreement. The petition recites a large number of defects in the operation of the machinery, and that the machine wholly failed to work properly or in a satisfactory manner to the plaintiffs, or to properly perform the work for which it had been delivered; that, upon ascertaining the fact, the plaintiffs notified the defendant, and also notified its agent at Aurora; that the defendant, through its agents, attempted to put said machinery in proper working order so as to comply with the contract; that the defendant, after having attempted at different times to remedy the defects and to place the machinery in proper condition, abandoned said property, and notified plaintiffs that they would make no further attempts to remedy the defects; that the machinery taken together at the time of the abandonment was wholly worthless for the purposes of a threshing outfit, and that, within 48 hours after defendant refused to attempt to place said machinery in proper work-

ing order and abandoned the same, the plaintiffs returned said machinery to the agent of the defendant, demanded the return of the money and notes, and also the return of the second-hand engine, loader and separator which they had delivered to the defendant, but that the defendant refused to return the same.

For a second count the plaintiffs, after making the same allegations with reference to the contract and the failure of the machinery to work properly, alleged that a number of the notes given are not yet due; that the defendant has disposed of some of said notes to innocent purchasers; that plaintiffs are without adequate remedy at law; and they ask that the court render an alternative judgment requiring defendant to deposit the notes with the clerk of the court for cancelation within a short day to be named by the court, or to give plaintiffs a judgment for their face value. They also ask judgment for the value of the machinery turned over to the defendant. Since the proper disposition of the case rests mainly upon the question of what issues were raised by the pleadings, we copy the answer at length.

"Comes now the above named defendant and, for answer to the first count of plaintiffs' petition, admits that the defendant is a corporation organized under the laws of the state of New York; that on the 21st day of February, 1902, at Aurora, Nebraska, plaintiffs and defendant entered into a contract for the purchase and sale of the machinery described in said petition; that plaintiffs received said machinery, paid freight thereon in the sum of $143.75, turned over to defendant the property of plaintiffs in said petition described, as part payment of the purchase price of said machinery, and made and delivered to defendant their promissory notes for the balance of said purchase price, to wit, $1,850, as mentioned and described in the petition. The defendant further admits that said machinery was accepted by the plaintiffs under warranty and subject to trial, but denies that the terms of said warranty and the conditions of such trial are as alleged in said

petition. For a second and further defense to said first count, defendant denies every allegation thereof not herein specifically admitted. For answer to that part of the second count of said petition not contained in the first count thereof, defendant admits that the notes given by plaintiffs to defendant and described in plaintiffs' petition are negotiable promissory notes, and that a part of the same are not yet due. For a second and further defense to the additional allegations of said second count, defendant denies each and all said allegations not herein specifically admitted." We find no reply in the transcript.

At the request of the plaintiffs, the first cause of action set up in the petition was set off to be tried by a jury, and the second cause of action was retained for trial by the court. The jury found for the plaintiffs as to the first cause of action, and so likewise did the court as to the second count. Judgment was rendered, from which the defendant prosecutes error to this court.

The plaintiffs in error contend, first, that there is a variance between the pleading and the proof, since the proof showed a written warranty; that the purchaser is bound by the terms of his contract and all the conditions therein unless he pleads and proves a waiver of such conditions, and that it is necessary to plead a waiver in order to offer proof thereof, and that the conditions in the written warranty are conditions precedent to the right of rescission, and must be complied with unless a waiver is pleaded and proved. It will be observed that the answer admits "that said machinery was accepted by the plaintiffs under warranty and subject to trial, but denies that the terms of said warranty and the conditions of such trial are as alleged in the petition." This action, under the allegations of the petition, is not an action brought upon the warranty, but an action for the recovery of certain personal property and for the cancelation of notes delivered by Meixel to the Westinghouse Company, to be held by it pending a trial of the machinery to ascertain if it operated satisfactorily to Meixel. If it so operated he

agreed to purchase it, but if it did not so operate he was under no such obligation. The petition alleges that the machinery failed upon trial and that Meixel, in accordance with the agreement, returned the same and demanded a return of his property and notes. The answer admits that the machinery was accepted under warranty and subject to trial, and denies, in general terms, the other allegations of the petition, but fails to plead the existence of any other agreement than that set out in the plaintiffs' petition. Under this state of the pleadings, the only question left to be determined was whether the machinery was defective, and whether Meixel had carried out the provisions of the conditional agreement upon his part.

Instruction numbered 5 given by the court, which is as follows, is complained of: "The principal question for the jury to determine is whether or not the threshing outfit in fact did good work and operated to the satisfaction of the plaintiffs. This question should be determined wholly from the evidence introduced before you. If the jury believe, from the evidence, that such threshing outfit, in fact, did not do good work, and that it was not adapted to the use for which it was purchased, and that it failed to operate satisfactorily to the plaintiffs, and you further find that the defendant, when notified of such failure, failed to so adjust said threshing outfit as to make it work satisfactorily, and thereafter refused to further adjust said machinery, and that plaintiffs within 48 hours thereafter returned said threshing outfit to defendant's agent at Aurora, and demanded the return of their property and notes, then the plaintiffs would be entitled to your verdict." This instruction however correctly states the issues framed by the pleadings and was proper to be given.

A large number of witnesses were examined as to the facts with reference to the failure of the machine to perform good and satisfactory work. It would seem that the friction clutch, which is a device brought into use when it is desired to use that part of the machinery of the engine which gives it its power of locomotion, was defect-

ive, and that Meixel had considerable trouble in moving his engine from place to place on account of this defect. The season had been wet and rainy, and a great deal of the grain was damp and in bad condition to thresh. It is shown that the engine consumed large quantities of coal for the work that it performed, and that the separator failed to separate the wheat from the straw to such an extent that a great deal of the wheat was carried over with the straw, and spilled upon the ground at the end of the blow stacker; that Meixel had serious complaints from his patrons with reference to the operation of the machine, and the manner in which it wasted grain, and that he complained to the agent of the company of these defects. That, on the 12th of August, H. T. Jensen, the agent of the defendant, from whom he bought the machine, went to look at the engine, and wrote to the defendant's agency at Council Bluffs with reference to the friction clutch and to the large coal consumption; notifying them that it was of the utmost importance that they send one of their experts at once. In response to this letter, a man named Robinson was sent on the 14th instant to look at the engine. He did practically nothing toward remedying the defect, and, on the 28th of August, Meixel having again complained, another letter was written by Jensen to the Council Bluffs agency with reference to the machine. In reply to this letter, the Council Bluffs agency wrote Jensen saying they had referred his letter and Meixel's complaint to the factory. On the 30th day of August, Jensen also wrote to the Schenectady office of the defendant, describing the complaint made regarding the engine and the condition of the machinery. On September 19, 1902, Meixel's attorneys, Messrs. Hainer & Smith, at his request, wrote to the Westinghouse Company at Schenectady, New York, explaining the trouble that Meixel had had, and requesting that the outfit be put in proper condition; suggesting that they send a man with a new clutch. To this letter of September 19 the company replied that the engine was not to blame; that the trouble was due to the improper handling

of the engine, and to the use of an improper lubricant, but that they were friendly to Meixel and were preparing another friction clutch, which they would send him in a few days. On October 2, 1902, Hainer & Smith again wrote to Schenectady, reciting the defects in the engine and separator, combating the assertion that the trouble was caused by a defective lubricant, requesting that the company send an expert to give the machinery a further test, and offering all possible friendly assistance to that end. On October 17, 1902, H. J. Edwards, the Council Bluffs agent of the defendant, went to see Meixel at Aurora with reference to the collection of Meixel's note that was due October 1. At that time Meixel said that he did not intend to pay the note, that the engine burned too much coal, that the separator had wasted the grain, and that he did not intend to pay the note unless the machine would run right. On October 27, one Corey, an employee of the defendant, was sent by the company to the place where Meixel was threshing. He made some changes in the separator, and the next day made some other adjustments, and tested the coal consumption of the engine. It seems that, after he had done all he could, Meixel was still dissatisfied with the work the machine was doing, and, since Corey had failed to make it do satisfactory work, he told him that he would not keep the machine, and asked him where to take it. Corey told him he had bought the machine, and gave him no directions as to what disposition to make of it. Within 48 hours after this, Meixel delivered the machine to the defendant's agent at Aurora. Meixel's complaints and the company's promises and efforts to remedy the defect continued up until the time of the return of the machinery. Under this state of facts, the company waived the provision of the written contract that continued use after four days' trial should constitute an acceptance.

There is a conflict in the evidence as to the defects in the machinery, but there is ample evidence to support the verdict of the jury. Numerous errors are assigned in regard to the introduction of evidence and with reference

to instructions of the court, but these assignments are based upon the contention that compliance on the part of Meixel with the terms of the written warranty were conditions precedent to his right to rescind, and must be pleaded before he would be entitled to maintain this action. Under the pleadings, however, as they stand, the action is not upon the warranty. If the plaintiff in error desired to take advantage of the provisions of the written contract, it should have pleaded the same in its answer.

It is complained that the decree of the court requiring the surrender of the note to the clerk of the district court for cancelation within 10 days has the effect of denying to the plaintiff in error the right of review. This is an erroneous conception of the force and effect of the decree. When its operation was suspended by the execution of a supersedeas bond, the time to deposit the notes for cancelation was extended until 10 days after a final affirmance of the judgment.

The case was carefully tried. The rulings of the court upon the evidence, and its instructions to the jury, were in accordance with the issues raised by the pleadings.

We recommend that the judgment of the district court be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FREMONT BREWING COMPANY V. WILLIAM SCHULZ.

FILED NOVEMBER 2, 1904. No. 13,631.

1. **Negligence**: INSTRUCTIONS. Issues as to the existence of negligence and contributory negligence are for the jury to determine when the evidence is conflicting, and where different minds might reasonably draw different inferences as to these matters from the facts established. It is only where the evidence is insufficient

to support a verdict that the court is justified in instructing as a matter of law that negligence did not exist.

2. ———: ———. Under the facts set forth in the opinion, *Held*, That the trial court rightfully submitted the question of negligence to the jury, and, further, that there was sufficient evidence to support the verdict.

ERROR to the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Courtright & Sidner, for plaintiff in error.

F. W. Button, contra.

LETTON, C.

The plaintiff in error, the Fremont Brewing Company, is the owner of a brewery at Fremont, Nebraska, and was operating the same during the year 1903. On July 16, 1903, William Schulz was employed by the brewing company in its grain house. It appears that a grain scoop therein was operated by steam power in such a manner that it worked by means of a friction wheel situated in the room below where Schulz was working, which friction wheel was brought into gear by means of a lever, a rope fastened to one end of the lever passing horizontally through a pulley, and thence perpendicularly up through a hole in the floor to the place where Schulz was stationed. Schulz's duty was, when the word was given by his fellow laborer, to pull upon said rope sufficiently to bring the friction wheel into gear, and hold it in that position until a windlass in the room below, which it operated, wound up a rope which passed up through another hole in the floor, thence to a pulley near the ceiling of the room where Schulz was working, and from thence over pulleys in the grain room to the scoop. The manner of operation was that, when it was desired to use the scoop, one man took hold of the same and gave the word to Schulz, who then pulled upon the rope which placed the friction wheel in gear and set the windlass in motion. He then held it tight,

so as to keep the wheels in gear while the winding of the rope pulled the scoop. It appears that the opening in the floor through which the large rope came which operated the scoop was about 4 inches wide and 38 inches long, with a guard about 4 inches high placed around it, the object of the guard being, as the plaintiff in error claims, merely to prevent grain from falling through the hole, while the defendant in error asserts that its purpose was to prevent the slack of the large rope from falling over onto the floor and forming a loop thereon. At the time the accident happened Schulz testifies that he had worked in the operation of this machine at intervals during the 3 weeks prior to the time of the injury, the total time of his operation of the same being about 5 or 6 hours altogether. That he was not instructed about how to operate the machine; that when the man who was operating the scoop would call to him to go ahead, he would pull up the gear rope; that he had to use all his strength in holding it until the man shouted "stop," when he released it. That on the day of the accident when he pulled upon the rope, after the command had been given by the man at the scoop, he noticed that the gear rope did not want to come; that he then put all his weight on it, and that finally it came suddenly; that he stumbled forward toward the slot in the floor that the large rope came through; he next noticed that his foot was in the slot, with the big rope which operated the scoop around his ankle; that when he let go of the gear rope the machine did not stop as it should have done, but kept going; that his foot was drawn into the slot; that it broke the guard board and broke his leg. He further testifies that the gear rope in the room below, which passed from the lever which operated the friction wheel through the pulley and thence passed up through the floor, had been broken, and that it had been repaired by using two small ropes which passed through the pulley instead of the large rope. The negligence charged is that the company failed to warn him of the dangers of the employment, failed properly to guard the opening in the

floor so as to prevent the large rope from forming a loop, and that it had negligently failed to keep in proper repair the rope and pulley beneath the floor, by which the friction lever was operated. The theory of the defendant in error being that one of the defective small ropes in the lower room caught at the side of the pulley when Schulz first pulled; that it suddenly slipped and gave way when he pulled harder, causing him to fall, and that afterwards when he released the rope on falling it again caught, which prevented the lever from acting, and kept the machine at work, thus pulling on the gear rope, drawing his foot into the hole and breaking his leg; that if proper precaution had been taken, either to guard the hole in the floor or to maintain the rope and pulley in the lower room in proper condition, the accident would not have happened. The sole ground of error alleged is that the evidence does not support the verdict, and that the jury should have been instructed to find for the plaintiff in error.

There is a conflict in the evidence with regard to the condition of the rope and pulley which operated the lever at the time of the accident. The testimony on the one hand being that 2 quarter-inch ropes had been used in the place of one half-inch rope; that there was a space of about five-eighths of an inch between the edge of the pulley and the wooden block supporting it, so that the small rope could catch thereon; and that the block sustaining the pulley introduced in evidence by the brewing company had been changed, and was not the same block that was in use at that time. On the other hand, the testimony is that but one rope was used with the pulley, instead of 2 small ones, and that the block and pulley introduced in evidence were the same as were in use at the time of the accident. The uncontradicted testimony shows that machines of this character have largely gone out of use, being replaced by automatic machines; and that, when they were in common use, guard rails of from 18 inches to 2 feet in height were usually placed around the slot or opening in the floor through which the rope works. The

plaintiff in error asserts that the rope could not have gotten around the plaintiff's ankle unless he had placed it there himself, while the theory of the defendant in error is that, when his fellow laborer inserted the scoop in the grain, a slack was caused in the rope, which ran back over the pulleys and formed a loop upon the floor. That, when he stumbled by reason of the rope below suddenly being released, his foot was caught in the loop and thereby drawn into the slot. There is no evidence that a loop was there except the inference which may be drawn from the fact that Schulz's foot was caught and pulled into the slot, though the testimony shows that when the scoop is inserted in the grain it may cause 18 inches to 3 feet of slack in the rope. It seems clear, however, that, if a guard of 18 inches to 2 feet had been placed around the hole in the floor, the accident in all probability would not have happened.

The issues as to the existence of negligence and contributory negligence are for the jury to determine when the evidence is conflicting, and where different minds might reasonably draw different inferences as to these matters from the facts established. It is only where the evidence is insufficient to support a verdict that the court is justified in instructing as a matter of law that negligence did not exist. Under the testimony which tended to prove the substitution of 2 quarter-inch ropes for a half-inch rope in the working of the lever, and which tended to show that the pulley was so loose that a distance of five-eighths of an inch existed at the side of it, in which a small rope might catch, then, the probability of the rope becoming caught and failing to stop the machine might have been foreseen, and the plaintiff in error would be guilty of negligence in allowing this condition to exist; and if the usual practice in the construction of machinery of this nature was to place a guard 18 inches to 2 feet high around the slot where the rope operated, so that a slack of 18 inches to 3 feet could not form a loop upon the floor, then, ordinary care on the part of the plaintiff in

error would have required the construction of such guard, and failure to furnish such guard would be negligence. The testimony offered by the defendant in error upon these points required the submission of the issue as to whether negligence existed or not to the jury, and it would have been erroneous for the court to determine the question as a matter of law. For these reasons, the judgment of the district court should be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. FIRST NATIONAL BANK OF ATKINSON, V. DANIEL J. CRONIN, TREASURER OF HOLT COUNTY, NEBRASKA.

FILED NOVEMBER 16, 1904. No. 13,664.

1. **Act Constitutional.** The act of 1903, amending sections 18 and 20 of article III, chapter 18, and section 3*a* of article XIII, chapter 83 of the Compiled Statutes of 1901, so far as it relates to the deposit of county funds, was constitutionally adopted and is a valid law.

2. **County Funds, Deposit of.** Under the law as thus amended it is the duty of each county treasurer to keep at all times on deposit in each of the depository banks of his county such a proportionate share of the public money subject to deposit as the amount of the paid up capital stock of each bank bears to the whole amount of paid up capital stock of all of such banks.

3. **Mandamus** will lie to compel such officer to perform his duty, and comply with the provisions of said law.

ORIGINAL application for a writ of mandamus to compel respondent to deposit in relator bank its pro rata share of the county funds. *Writ allowed.*

R. R. Dickson, for relator.

Arthur F. Mullen and *M. F. Harrington, contra.*

BARNES, J.

On the 5th day of April, 1904, the relator, the First National Bank of Atkinson, filed its application in this court against the respondent, Daniel J. Cronin, as treasurer of Holt county, praying for a peremptory writ of mandamus to compel the respondent to deposit in the relator bank its pro rata share of the funds of Holt county, as provided by section 18, article III, chapter 18, Compiled Statutes, 1903 (Annotated Statutes, 10870). An alternative writ was allowed, returnable May 3, 1904, and on that date the respondent filed his answer herein, by which he practically admitted the allegations of the alternative writ, but alleged that the law in question was never constitutionally passed by the legislature, and was therefore void. For that reason respondent prayed that the alternative writ be quashed, and the action dismissed.

From an examination of the pleadings and the stipulation on which the case was submitted, there appears to be no dispute as to the facts. The record discloses that there are in Holt county 11 banking institutions, with an aggregate paid up capital of $203,500; that all of said banks, including the relator, have been selected by the county board of supervisors as county depositories; that they have all given bonds, which have been approved, as required by law, and, if the act in question is valid, each one of the said banks is entitled to receive on deposit its pro rata share of the county funds; that before and at the time of the commencement of this action the respondent had refused to carry out the provisions of the law, and that the relator had on deposit at that time only $3,759.24 of the said funds, when its pro rata share thereof was $8,697.55. So it may be said at the outset that, unless the contention of the respondent as to the invalidity of the

law in question is sustained, the relator was entitled to the relief prayed for by its petition.

An examination of the legislative journals shows, and in fact the pleadings and stipulation state, that the law which is the basis of the relator's right of action was passed by the legislature of 1903, and was known as house roll No. 136. It was introduced in the house under the following title: "A bill for an act to amend sections eighteen (18) and twenty (20) of chapter eighteen (18), article three (3) of the Compiled Statutes of Nebraska of 1901, and to repeal the said original sections." It was read the first time on the 16th day of January, 1903; the second time on the 19th day of January, and referred to the committee on county boundaries, county seats and township organizations. On the 25th day of February the bill was read the third time, put upon its passage and received the necessary constitutional number of votes to pass it with the emergency clause. The bill was then sent to the senate, where it was read the first time on the 26th day of February; the second time on the 27th day of that month, and it was then referred to the committee on counties and county boundaries. On the 5th day of March it was reported back to the senate by the committee, under the same title by which it had been read three times in the house and twice in the senate, with the recommendation that it be passed. Thereafter it was amended in the committee of the whole and referred back to the senate, with the recommendation that it be recommitted to the judiciary committee; that committee recommended that the title be amended so as to read as follows: "A bill for an act to amend sections eighten (18) and twenty (20) of article three (3) of chapter eighteen (18) and section 3*a* of article thirteen (13) of chapter 83 of the Compiled Statutes of Nebraska for 1901 and to repeal said original section." The body of the bill was also amended so as to include an amendment of section 3*a*, article XIII, chapter 83 of the Compiled Statutes of 1901, and thus extend its provisions to the deposit of public money by the state

treasurer in depository banks. The bill was thereupon read in the senate the third time, was put upon its passage, and received 31 votes, which were more than the number sufficient for its passage, with the emergency clause. It was thereafter reported back to the house with the request that the house concur in the senate amendments. It was then read in the house, and the senate amendments were concurred in. It was afterwards properly signed by the presiding officers of the house and senate, and regularly approved by the governor.

It is the contention of the respondent that the bill in question was not read in the house of representatives on three different days with the identical title that it bore at the time of its introduction; and the argument of respondent's counsel proceeds on the assumption that the title and body of the bill, as changed by the senate amendments, must have been read at large on three different days in each branch of the legislature after the adoption of such amendments, before it could be said that the bill was constitutionally passed. Respondent further assumes that the change in the title was a substantial one. Both of these assumptions are unwarranted. It is true that by section 11, article III of the constitution, it is provided:

"Every bill and concurrent resolution shall be read at large on three different days in each house, and the bill and all amendments thereto shall be printed before the vote is taken upon its final passage. No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed."

But this provision was not intended to prevent amendments and corrections of mistakes in the title of bills pending before the legislature; and it is not believed that any authority can be found which supports respondent's position. It has never been held by this court, nor by any other, so far as we have been able to ascertain, that it is not competent for the legislature to correct defects or

imperfections in the title of a bill, or amend it, at any time before it is put upon its final passage. As was said in *Richards v. State,* 65 Neb. 808:

"The constitution requires that the subject of the bill shall be expressed in its title, but no law has ever been annulled because it passed through some of the earlier stages of legislation under an imperfect title. The title is amendable as well as the body of the bill, and it is in accordance with accepted canons of legislative procedure to amend it at any time before final action is taken."

In *Attorney General v. Rice,* 64 Mich. 385, the court said:

"If the object of the act as passed is fully expressed in its title, the form or status of such title at its introduction, or during any of the stages of legislation before it becomes a law, is immaterial. To hold otherwise would, in many cases, prevent any alteration or amendment of a bill after its introduction, as, in legislative practice, it frequently becomes necessary to amend the title as introduced in order to conform to changes in the bill."

In *Cleland v. Anderson,* 66 Neb. 252, we said:

"Section 11, article 3, of the constitution, does not require that amendments made to a bill while under consideration by the legislature be read at large before each house on three different days; but it is sufficient that such amendments be printed, as required by said section, and that the bill, as amended, be adopted by both houses."

That the course above indicated was pursued by the legislature in passing the bill in question is conclusively shown by the journals of that body.

Again, the change of the title, except as to the clause which relates to section 3*a,* above mentioned, was not material. The title to the bill, as introduced, was, "A bill for an act to amend sections eighteen (18) and twenty (20) of chapter eighteen (18) of article three (3) of the Compiled Statutes of the state of Nebraska of 1901, and to repeal said original sections"; and the change effected by the legislature, leaving out of consideration that part

of the title as finally agreed to which treats of section 3*a*, article XIII, chapter 83, was simply to transpose a part of it so as to read, "article 3 of chapter 18," instead of "chapter 18 of article 3." No one could have been misled by the title to the bill, as originally introduced, because the slightest investigation would inform any one what particular sections of the statute were to be amended thereby.

The respondent further assails the bill on the ground that the senate amendment thereto was not germane to the two sections mentioned in its original title, and was not embraced therein. Conceding that this objection is well taken, which need not be determined in this action, that part of the act which relates to the deposit of county funds is valid and must be upheld. It seems clear that so much of the bill as relates to the deposit of state funds by the state treasurer may be rejected without affecting that part of the law covered by the original title. Where this can be done, so much of the law as is valid will be upheld. *State v. Stuht,* 52 Neb. 209; *State v. Stewart,* 52 Neb. 243.

We therefore hold the act in question, so far as it relates to the matter in controversy in this case, was constitutionally adopted, and is a valid law. As no other defense was interposed to the issuance of a peremptory writ, it follows that the relator at the time of the commencement of this action was entitled to the relief prayed for, and a peremptory writ of mandamus is awarded in accordance with the prayer of the relator's petition.

WRIT ALLOWED.

STATE OF NEBRASKA, EX REL. FIRST NATIONAL BANK OF O'NEILL, V. DANIEL J. CRONIN, TREASURER OF HOLT COUNTY, NEBRASKA.

FILED NOVEMBER 16, 1904. No. 13,665.

Mandamus. The opinion in *State, ex rel. First National Bank of Atkinson, v. Cronin, ante*, p. 636, is approved and followed. Peremptory writ of mandamus allowed.

ORIGINAL application for a writ of mandamus to compel respondent to deposit in relator bank its pro rata share of the county funds. *Writ allowed.*

R. R. Dickson, for relator.

Arthur F. Mullen and *M. F. Harrington, contra.*

BARNES, J.

The application herein for a peremptory writ of mandamus was filed in this court at the same time that *State, ex rel. First National Bank of Atkinson, v. Cronin, ante*, p. 636, was commenced; and an alternative writ was issued, returnable May 3, 1904. The application was based on a like state of facts, and the return to the alternative writ was the same as in the case above mentioned. It appears that at the time the action was commenced the relator had on deposit only $12,031.82 of the county funds, when its pro rata share of said funds was $17,595. Under the undisputed facts, and the rule announced in the opinion cited, the relator is entitled to the relief prayed for, and a peremptory writ of mandamus is therefore allowed.

WRIT ALLOWED.

HELEN SCHWINGEL ET AL., APPELLANTS, V. JOHN HENRY ANTHES ET AL., APPELLEES.*

FILED NOVEMBER 16, 1904. No. 13,378.

Trusts: PRESUMPTION. One who acquires a trust estate with knowledge of its character, and while occupying confidential relations toward it and the *cestuis que trustent*, will be presumed to have taken the title subject to the trust, and that presumption cannot be rebutted without evidence, nor by such as is vague and ambiguous.

APPEAL from the district court for Clay county: GEORGE W. STUBBS, JUDGE. *Judgment of affirmance vacated. Judgment of district court reversed.*

H. C. Palmer, John C. Stevens and *John J. Sullivan*, for appellants.

S. W. Christy, J. L. Epperson & Sons and *Thomas H. Matters, contra.*

AMES, C.

This is a rehearing from a former decision published unofficially in 5 Neb. (Unof.) 345. The case, as it is now regarded, presents some aspects not adverted to on the former argument, and the statement of facts already made needs to be somewhat supplemented. The will, which, together with the deed by the testator to his wife, constitutes the common source of title of the parties to this action, appears to have been drawn by the testator's own hand. It is apparent from a moment's inspection of it that he was not only not familiar with legal forms or phraseology, but that, being of foreign nativity, he was unable to express himself accurately in the English language, upon ordinary subjects of conversation. The following is, as far as possible, a literal copy of the instrument.

* Rehearing denied. See opinion, p. 649, *post.*

"This 6 day of Stp. 1886. To hwom it may consern.

"This is my Last Will Testament of Jacob W. Anthes of the county of Clay stat of Neb

"Mindfoll of the uncertainties of human life do make buplish and declare this My last will and testoment in the manner following first after the paiment of my just depts and funeral expenses I give devise and bequeath to My two sons Henery Anthes and W. C. Anthes each $500, five Hundred Dollars To My doughters Helen Schwingel Elisbet Schwab and Katarin Briedenbah shall have Equally withe to the rememder of all my Estates both Real and personal whict the two sons Henery Anthes and W. C. Anthes schare and schare alike

"The said Helen Schwingel received the sum of $250 will I was living whearth shall be deducked from widoud interest (2) Second id is My will tat My wife Elisabeth Anthes schal have all the real and personel estates fore her own jues wile schea is living after her dead id schall be and becom as discriebt in this will abouvf

"I hereby nominad and appoint my wife Ealisabet Anthes the executor of this my last will and testament and herepy authorise empower her the said Elisabet Anthes to compound compromise and settle any claim or demand which may be against or in favor of my said estate in witness whereof I have hereunto set my hand and seal this 6 day of Sep 1886

"Signed pupblished and declared by the said Jacob W. Anthes to be his last will and testament is presence of us who have signed our names ad his request as witnesses is his presence an in the presence of eacd other.

"JACOB W. ANTHES."

For the right disposition of this suit much depends, in my opinion, upon the true construction of the will, a subject which seems to have been, hitherto, somewhat neglected.

For an interpretation of this instrument it is unnecessary to repeat the settled rule of this court that the object to be kept principally and constantly in view is to ascer-

tain the intent of the testator, and, in so far as it is consistent with general rules of law, to carry it into effect. A circumstance throwing light upon this question is the fact that he had no personal property of considerable value, and that he was indebted to a relatively large amount in addition to the sum of $3,500, for which all his real estate was incumbered by mortgage. It is clear, therefore, that he anticipated that some, if not all, of his lands, would be required to be sold for the payment of his unsecured obligations, and, whether wittingly or not, he employed language apt for the purpose of charging them as liens thereon. 2 Jarman, Wills (6th ed.), *1390 *et seq.* This fact, perhaps, explains why his benefactions to his sons and daughters took the form of legacies rather than of devises, and that the only specific devise he made was that of a life estate to his wife, leaving to his heirs a reversion rather than a remainder or remainders. The writer is prevailed upon to think that he intended so to do, both by the circumstances just mentioned and by the fact that the legacy to one of his daughters is but half that to each of her sisters, because of the fact, mentioned in the will, that she had already received $250, which was to be deducted from the sum bequeathed to her. First, the two sons were to have legacies of $500 each; then, the remainder (residue) of the estate was to be divided between the sons and daughters equally, deducting $250 from the share of Helen. Manifestly, this scheme could not have been carried out, and, in his circumstances, the testator could not have anticipated that it could be so, without the sale of the estate. This situation was without doubt sufficient to charge the first two legacies as liens upon the land, and I think the others also. 2 Jarman, Wills (6th ed.), *1409 *et seq.*

If the foregoing reasoning is sound, the word "devise" was not used in the will in its technical or legal sense, but as synonymous with "give" and "bequeath." As illustrating my idea, if the demise of the life tenant had immediately succeeded that of the testator, the reversioners would

have at once succeeded, as tenants in common, to the possession of the estate, charged with a trust, first, for the payment of the debts of the testator; second, for the payment of the two legacies of $500 each to his sons; and third, for the division of the residue equally between all of his sons and daughters, deducting the advancement to Helen. It is possible that some adjustment might have been made with the latter, and that some means might have been discovered by which the debts and specific legacies could have been discharged, and, if such an event could be supposed to have been contemplated by the testator, the sons and daughters might be regarded as remaindermen rather than reversioners; but, in my opinion, such an event cannot reasonably be supposed to have been anticipated nor therefore intended by him. But, if the estate expectant upon the termination of the life tenancy should be regarded as a technical remainder instead of one of inheritance—as, correctly and precisely speaking, it perhaps ought to be—the limitation over would be subject to the same trusts and charges above mentioned, and the consequences would be the same as under the former supposition. In either view, a title in fee vested upon the death of the ancestor in the persons who then became his sole heirs at law, and the distinction just adverted to is without practical importance. In any event, that to which the testator intended that his sons and daughters should succeed in common was a residue of his estate to be left after the payment of his debts and the specific legacies. The deed from the testator to his wife was made for the sole purpose, expressed upon its face, of insuring the due observance of the will, and was therefore testamentary in character, and is also of no practical significance. The deed of August 29 by the heirs to their mother was, as is stated in the former opinion, evidently made for the sole purpose of enabling her to obtain a new loan for the satisfaction of the $3,500 mortgage executed by the testator. Nothing seems to have been said or done at the time of its execution indicating an intent by any

of the grantors to release his interest as devisee or legatee in the estate, and there is no reason to suppose that, if nothing more had been done, the present defendant, John H. Anthes, would have considered himself deprived by the transaction of his specific legacy of $500, which had precedence of all the other beneficences of the will except the life estate, and except a like legacy to his brother. It cannot be doubted, I think, that the mother by this means obtained, and for the ensuing seven years retained, the legal title, subject to the trusts created by the will. The deeds from the husbands of the respective daughters were merely intended to fortify the legal title, and evidently were not supposed to affect the fiduciary character of the grantee.

When in 1895, after the sale to Peterson, it was desired, both by the purchaser and by the widow and heirs, to obtain new loans, and objections to the title were made by the loan agent, it is clear that the new deeds then made were executed, not upon any new consideration, or for the purpose of conveying any title or interest which the grantors did not suppose they had parted with when they executed the former instruments. In other words, the deeds of October, 1895, were not intended to be deeds of conveyance, but of confirmation, and the trust character of the legal title in the mother was not thereby affected. That John H. Anthes so understood the situation is evident, both from the circumstances attending the transaction, and from his subsequent conversations in which he consulted with his brother and sisters relative to the sale of the residue of the land to the Challbergs, and in which he talked about their respective "shares" and the desire of his mother that something should be abated from each to make up a purse for her support during the remainder of her life. The relations between the parties were in the highest degree confidential, calling for the exercise of the uttermost good faith, and none of them was ignorant of any material fact or circumstance. That John H. knew that the mother had no beneficial interest in the land ex-

cept her life estate, and that she held the legal title upon the trusts mentioned, is beyond doubt. Nor can it be doubted that, if his mother had died in the trust, he would have been among the first to demand an enforcement of his lien for the satisfaction of his "share." The deed from the mother to him, although expressly for $9,600, was without any real consideration, and was evidently made solely for the purposes of effecting a confirmation of the title of Peterson, and of facilitating the sale to the Challbergs. The fact that his brother and sisters acquiesced in these transactions is, under the circumstances, no evidence that they intended to waive or release their pecuniary interests in the estate, which by the recent rise in prices had become valuable. John H. having acquired the nominal title to a trust estate with knowledge of the trust, and, moreover, while occupying a confidential relation toward it and the *cestuis que trustent,* is presumed to have intended to take subject to it; and this presumption cannot be rebutted without evidence or by such as is, to say the most of it, vague and ambiguous. Much of it that came from his own mouth is distinctly confirmatory of the trust, which he seems never to have shown a disposition to repudiate by word or deed until he was called upon for an account of his stewardship, shortly before the beginning of this action.

The parties are all agreed that the title of the Challbergs, as well as that of Peterson, shall remain undisturbed by the final decree, and that the title of both shall be affirmed upon payment by the former of the price stipulated in the contract of purchase, and that a final accounting between the parties and a distribution of the fund shall be adjudged. This agreement should, of course, be respected. If either of the life tenants has during incumbency satisfied, out of means not derived from the body of the estate, debts of the testator charged as liens thereon, he or she will be entitled, upon the accounting, to reimbursement, in accordance with the rule announced by this court in *Tindall v. Peterson,* 71 Neb. 166.

It is recommended that the former decision of this court be vacated and set aside, and that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with this opinion.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the former decision of this court be vacated and set aside, and that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

The following opinion on motion for rehearing was filed March 8, 1905. *Motion denied:*

PER CURIAM: The very earnest and quite able brief of the appellees on their motion for rehearing discusses the proposition as though the will were a devise of lands to the parties named. The opinion of the commissioner upon the second hearing construes the will to direct a sale of the land and a distribution of the proceeds. If this is the proper construction of the will the statute of frauds has no application. It is considered that all parties acquiesced in the long delay because of the unfavorable conditions for selling real estate which obtained for a large portion of the time at least, and that the final sale to Peterson and the Challbergs was a consummation of the provisions of the will acquiesced in by all parties. It is insisted in the brief upon the motion that the labor and good management of Henry Anthes had much to do with creating the values realized upon the sale of the land, and that the disposition of the case will deprive him of fair compensation for his services; and also that the widow will be deprived of her life interest, but there seems to be no ground for this apprehension, as in stating account the trial court

can hear the evidence and do complete justice to all the parties.

It is also insisted that the condition of the pleadings is such that this disposition of the case is not justifiable. The pleadings are not entirely satisfactory. Upon another hearing they can be amended, if found necessary. We think the facts pleaded show that the plaintiffs are entitled to the relief indicated in the opinion.

The motion for rehearing is

OVERRULED.

MARTHA J. SHOEMAKER V. COMMERCIAL UNION ASSURANCE COMPANY, LIMITED, OF LONDON.

FILED NOVEMBER 16, 1904. No. 13,638.

Pleading: DEPARTURE. An amended petition which is no more than a restatement of the *gravamen* of the charge in the former pleading is not a departure, although the petition sounded in tort and the amendment avers a contract liability only.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

George A. Adams and *Lamb & Wurzburg*, for plaintiff in error.

Ricketts & Ricketts, contra.

AMES, C.

A former decision in this controversy may be found in 63 Neb. 173. After the judgment of reversal there pronounced, and after the return of the cause to the district court by mandate, the plaintiff abandoned her suit against all the defendants except the insurance company, against which she filed an amended petition in which she alleged that said defendant on the 5th day of January, 1895,

agreed to insure the property described in the former pleading against loss or damage by fire to the amount of $1,200, but wrongfully refused, and still refuses, to deliver such policy to the plaintiff, as it had agreed to do. It was further alleged that the building had been destroyed by fire during the agreed term of insurance, and that proofs of loss had been made and furnished to the company, and payment demanded from it, which had been refused.

A general demurrer to this amended petition was sustained upon the ground that it states a new cause of action, and one distinct from that set forth in the original petition or the amended petition, upon which the action was formerly tried, and that suit thereon is barred by the statute of limitations.

We think the district court erred. It is true that the earlier pleading, which is set forth at length in the former opinion, was one in some degree sounding in tort, but, as is there stated, the subject matter of the alleged tort was the alleged contract obligation of the insurance company to the plaintiff. In the absence of such obligation there would have existed nothing about which the company could have been accused of conspiring with the other defendants, but, if there was such insurance, the alleged conspiracy would have been ineffectual to avoid it, and no damages would have resulted therefrom, and so it was held that the petition did not state facts constituting a *joint* liability of the defendants. But it was not held, nor could it have been rightfully so, that the facts pleaded were not sufficient to charge the company with a separate contractual liability. The amendment, of which complaint is made, did no more than to eliminate the futile averments of conspiracy. The *gravamen* of the charge, namely, the alleged contract between the insurance company and the plaintiff, and a breach of it, is the residuum of the former pleading after the completion of the process of precipitation, and is in no sense a departure, or the introduction of a new subject of litigation. It is therefore

recommended that the judgment of the district court be reversed and the cause remanded for further proceedings.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings.

REVERSED.

GEORGE M. LODGE V. FRANCES S. FITCH.

FILED NOVEMBER 16, 1904. No. 13,014.

1. **Advancements.** To constitute an advancement as defined in section 37, chapter 23, Compiled Statutes, 1903, it is necessary either that the ancestor express in the gift or grant his intention that it be an advancement, or that he charge it in writing as an advancement, or that the child or other descendant acknowledge in writing the gift or grant as an advancement.
2. ———. A debt from an heir to an ancestor may be converted by the ancestor, with the consent of the heir, into an advancement, but when such debt is evidenced by note or bond this fact raises a strong presumption that the transaction was intended as a loan and not as an advancement.
3. **Evidenced** examined, and *held* insufficient to show that a promissory note executed by a daughter and her husband to the father was intended as an advancement.

ERROR to the district court for Wayne county: JOHN F. BOYD, JUDGE. *Affirmed.*

Frank M. Northrop and *M. D. Tyler,* for plaintiff in error.

A. A. Welch, contra.

OLDHAM, C.

This is an action on a promissory note executed by George M. Lodge and his wife, N. S. Lodge, to Nathaniel

Smith, the father of Mrs. Lodge. The note was indorsed for collection by the payee to the plaintiff in this cause of action. The answer in the court below is that the money received upon the note sued on was paid and received as an advancement by Nathaniel Smith to his daughter, Mrs. Lodge. Mrs. Lodge had departed this life before the institution of the suit, and for that reason was not made a party defendant in the court below. The case, by agreement of parties, was submitted to the court, without the intervention of a jury, and a judgment and finding were entered in favor of plaintiff, and defendant brings error to this court.

There is little disputed testimony in the record, and the controversy arises as to the sufficiency of the evidence to show that the note in suit was given by Nathaniel Smith to his daughter as an advancement. The undisputed facts in the record are that Nathaniel Smith was a retired minister of the gospel at the time the note in suit was executed, was past 80 years of age, and had an estate consisting mostly of money; that he loaned this money to his children, taking notes, with interest reserved, from time to time; that in 1881 the defendant and his wife borrowed $150 of Mr. Smith, and gave a note to evidence the indebtedness; that in 1882 Mr. Smith insisted on their taking $500 more of his money. The defendant testifies that they did not need the money at that time, and hesitated to take it, but that Mr. Smith claimed that there was no probability that he would ever want the money during his lifetime. Accordingly, the defendant and his wife executed a note for the $500, and received the money. Later the note of $500 and $150 were both put into one note bearing 7 per cent. interest, and payable to Nathaniel Smith or his administrator 5 years after date. In 1889 the note in controversy was given by request of Mr. Smith, because he had lost or mislaid the former note. The first $650 note was given in response to a request contained in a letter written by Mr. Smith to his daughter from Geneseo, Illinois, on January 1, 1889. The communica-

tion is quite lengthy, and only the portion of it bearing on the execution of the note need be set forth. This portion is as follows:

"Inclosed in this I will send you a note embracing the other notes, putting the whole interest at 7 per cent. as you only have $650. I should like to furnish you $500 or more as soon as Alice (another daughter) pays in on her notes. But I want you to see to it that it is put where it will do you some good. If you have to, invest in the savings bank note. The bank here only allows four per cent. paid, sincerely that would be better than nothing. In my will I have not designated anything to the mission boards of the Congregational church, the foreign and home boards, but I thought I could do better for the children and just as well for the boards by requesting them to give one per cent. of their inheritances to the boards after I am gone. By doing this annually they would remember their legacy, and from whence it was derived. I have written to Frances (another daughter) about this. She acquiesced in it. I shall write to all on this point and wish your reply. I thought if seven per cent. could be paid while I am here, one per cent. could be easier done after I am away. What a pity Leander has so much money. He cannot find any place for a home. You and Mr. Lodge can sign this note and return it, and I will send these (the former notes) marked paid. I remain, Your father, Nathaniel Smith."

On the 9th day of January, 1889, Mr. Smith directed a communication to the defendant George M. Lodge, concerning the note in controversy, as follows:

"Yours postmarked the 7th was received here the 8th, enclosing note. The note was signed all right, but what has become of it is more than I can tell. I have hunted my room all over. It seems I must have been very careless. It is one of the greatest mysteries I have ever tried to understand. So, I have concluded to write another note for you to sign. I know it is asking for a great deal of credulity from others, but if that note is found I will send it to you, signed, paid by duplicate, and you can keep this

letter as good testimony in the case. I do not see but that I shall have to give in that my memory is failing. P. S. You will understand that the notes I have taken of children for money loaned will be considered as so much cash, and will at my death be returned to you in the room of so much cash. This is to save you the necessity of sending the money to pay them and having it returned to you again. I shall endeavor to even up the inheritances as soon and as far as possible. My funds are now in the hands of my children except $1100. I am trying to get things in a satisfactory condition to leave."

At the time of the suit on this note Mr. Smith was still living at the age of 92 years, and gave a deposition which consisted mostly of categorical answers to direct questions propounded to him. After answering the interrogatories that he had indorsed the note to the plaintiff for collection, in answer to the question, "For what was that note given by Mr. and Mrs. Lodge?" he answered, "For money that I had loaned to them." In answer to the interrogatory, "State whether the money for which this note was given was an advancement or gift from you to your daughter Mrs. Lodge, or was intended as such," he answered, "It was not intended as a gift or advancement." In answer to the interrogatory, "State whether or not you ever made an advancement to your daughter Mrs. Lodge, or to any other children of yours," he answered, "I made no advancements or gift to any of my children. I made loans to them, but no gift." This constitutes all the material testimony contained in the record touching on the question at issue.

Section 37, chapter 23, Compiled Statutes, 1903 (Annotated Statutes, 4937), provides: "All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant." Under this section of the statute, the essential elements of an advancement are, first, that they

are expressed in the gift or grant to be made as such; or, second, that they are charged in writing by the intestate as an advancement or acknowledged in writing as such by the child or other descendant. Now, it seems clear from the testimony before set forth that the original delivery of the $150 and $500, for which the note in suit was subsequently given, was never expressed in any gift or grant to have been intended as an advancement, nor can we, by any fair interpretation of the letters to either Mr. or Mrs. Lodge, say that either of these letters contained a charge in writing made by the intestate against the share of Mrs. Lodge in his estate for the amount of the note; nor is there any written acknowledgment from Mrs. Lodge of the receipt of this $650 as an advancement. In fact, the ancestor was not dead at the time the suit was instituted, nor is there any evidence as to whether he had or had not disposed of his estate by will. While it is true, as contended by counsel for defendant, that a loan from an ancestor to an heir may be converted by the ancestor into an advancement, yet to establish this fact it must be made to clearly appear that the ancestor expressed the intention to change the loan to an advancement, and that the heir acquiesced in the change. *Miller's Appeal*, 40 Pa. St. 57. Neither of these requisites is made to appear from the evidence in the instant case. It is a rule that, where the parent or ancestor receives such evidence of an indebtedness as a bond or a promissory note, the presumption is in favor of the transaction being construed as a debt, and not as an advancement, and, while this presumption is not absolute, it can only be overcome by clear and satisfactory testimony. As said in *Speir v. Speir*, 14 N. J. Eq. 240:

"A charge of the money or chattel advanced by the father to the son, or a memorandum of the fact that the sum advanced was intended as a gift, is received as evidence of the fact. Sometimes a bond or note is taken; but that converts the intended advancement into a debt from the son, unless a memorandum is elsewhere made of its real character."

It seems clear to us, in conformity with this view, that there is no competent evidence in the record to sustain defendant's theory of an advancement. The money in the first place was not given to defendant's wife, but, when furnished, its delivery was evidenced by a promissory note, bearing interest, payable to the ancestor or his administrator. If the original loan had been intended to have been converted to an advancement, the note would not have provided for its payment to the administrator of the ancestor. This, as well as the testimony of the ancestor, for whatever it is worth, leads us to the conclusion that the evidence sustains the judgment of the trial court, and we therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CITY OF MINDEN V. CARL A. VEDENE.

FILED NOVEMBER 16, 1904. No. 13,639.

1. Evidence examined, and *held* sufficient to sustain the judgment.
2. Held not error to permit the plaintiff, although crippled, to walk to the witness stand in the presence of the jury.
3. Trial: INSTRUCTIONS. Where the court has properly instructed on a material issue at the request of either of the litigants, it is not prejudicial to omit any reference to such issue from instructions given on the court's own motion.

ERROR to the district court for Kearney county: ED L. ADAMS, JUDGE. *Affirmed.*

J. L. McPheely, for plaintiff in error.

M. D. King, contra.

OLDHAM, C.

This was an action for personal injuries instituted by the plaintiff in the court below against the defendant city of Minden. The petition alleged, in substance, that plaintiff was injured by falling on a sidewalk in the city of Minden, on the evening of December 6, 1903; that the injuries were caused without any fault on plaintiff's part, but because of the negligence of the city in permitting its sidewalk to be and remain in a dangerous condition a long time previous to the injury. The answer was in substance a general denial and plea of contributory negligence. There was a trial to a jury, and verdict for plaintiff for $302. Judgment on the verdict, and defendant brings error to this court.

The first alleged error called to our attention in the brief of the city is that the judgment is not sustained by sufficient evidence. An examination of the testimony contained in the bill of exceptions shows that plaintiff introduced evidence tending to establish that the walk in question had been out of repair for about two months previous to the injury complained of; that it was a board walk on one of the principally traveled streets of the village, and at the place of injury contained numerous broken and loose planks; and that plaintiff, while traveling over this walk to his residence in the night time, stepped into a hole in the sidewalk and was thrown down, and, by reason of this accident, sustained a very painful and serious injury to his right ankle. While there was evidence in the record tending to show that plaintiff knew of the defect in the walk before the injury, yet he testified that he was walking at a moderate gait, and that he was unable to see the hole in the walk, on account of the darkness of the night, when the injury occurred. We therefore think that the plaintiff's testimony was sufficient to support the finding that the injury was occasioned alone by defendant's negligence.

It is next urged by the defendant city that, as there was evidence introduced tending to show that plaintiff had

been disabled by a former injury, which rendered him a partial cripple, he should, in view of this fact and the fact of his general knowledge of the dangerous condition of the walk, have traveled with extra care and caution on the defective street. Without expressing any opinion as to the soundness of this contention, it is sufficient to say, for the purposes of the case at bar, that this proposition was given to the jury in two intructions requested by the defendant, so that the jury must have found as a matter of fact, from the testimony, that plaintiff was using extra care and caution in traveling the street when the injury occurred.

It is further urged by the city that the court erred in permitting defendant to walk before the jury in his crippled condition, as such a spectacle was calculated to arouse the sympathy and passions of the jury. In the first place, we might say that the very meager quantum of damages awarded shows conclusively that the prejudice and passions of the jury were not visibly affected by plaintiff's walking in their presence; and, again, as plaintiff was a necessary witness in his own behalf, we do not see how he could well have proceeded to the witness stand without walking in the presence of the jury, unless he had been carried before it on a stretcher, which other exhibition might have had a stronger tendency to arouse sympathy and passion than the manner in which the plaintiff did approach the witness stand.

It is urged that the court erred in not instructing the jury, on its own motion, that the burden was upon the plaintiff to establish, by a preponderance of the evidence, each of the material allegations of his petition. This complaint is based on the assertion that an instruction given by the trial court, on its own motion, has much greater effect than one given at the request of counsel for either of the litigants. As all instructions given by the court are of and from the court, we are unable to concede that the jury is, or should be, more influenced by those given on the court's own motion than those given at the request of either of the litigants. In the case at bar, at the request

of defendant city, the court had given 7 instructions placing the burden of proof upon the plaintiff, not only generally, but specifically, to establish by a preponderance of the evidence each of the allegations in the petition. Having done this, we cannot see how he could have strengthened this proposition by giving a general instruction of his own covering the same question.

We have examined all of the instructions given by the trial court, most of which were requested by the defendant city, and are satisfied that the jury were instructed as favorably to defendant's contention as the law would permit, and as there is no complaint of the action of the trial court, either in the admission or exclusion of testimony, we recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ALVIN M. MILLER v. WILLIAM H. WALKER.

FILED NOVEMBER 16, 1904. No. 13,640.

Appeal: DISMISSAL. A judgment of the district court dismissing an appeal from the county court examined and approved.

ERROR to the district court for Scott's Bluff county: CHARLES L. GUTTERSON, JUDGE. *Affirmed.*

W. G. Simonson, for plaintiff in error.

Wright & Wright, contra.

OLDHAM, C.

This was a suit on the justice's side of the county court of Scott's Bluff county, instituted by plaintiff in the court

below to recover $74.10, alleged to have been due on account. The cause was heard in the county court on June 16, 1903, and judgment rendered in favor of plaintiff for the amount claimed. On June 25, 1903, defendant in the court below filed his appeal bond. On July 17, 1903, a transcript of the proceedings of the county court was filed with the clerk of the district court for Scott's Bluff county. At the following term of the district court, plaintiff's attorneys filed a motion in the district court to dismiss the appeal, because the transcript was not filed within 30 days from the rendition of the judgment in the lower court. This motion was sustained by the district court and defendant brings error to this court.

The only excuse offered for the failure to file the transcript within the time prescribed by section 1008 of the code is the claim of defendant's attorney that he was misled as to when the trains left from Alliance to Gering, and that this mistake prevented him from tendering the fees, and having the transcript filed within the time prescribed by statute. It is useless to say that this excuse is legally no excuse at all, and we therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WESTERN TRAVELERS ACCIDENT ASSOCIATION V. ISABELLE MCHENRY TOMSON, ADMINISTRATIX.*

FILED NOVEMBER 16, 1904. No. 13,546.

1. **Pleading: ANSWER.** A defendant may set forth in his answer as many grounds of defense as he may have, subject only to the requirement that such defenses shall not be so repugnant that if one be true the other is false.

2. ———: ———. Where an answer pleads a failure to give notice, and a reply pleads a waiver and estoppel, or matter to avoid the effect of failure to give notice, the allegation that no notice was given must be treated as admitted. *Dwelling House Ins. Co. v. Brewster*, 43 Neb. 528, followed.

3. ———: WAIVER. Where the pleadings admit that no notice was given and rely upon a waiver or estoppel by the insurer, the question of excuse or of whether notice was given within a reasonable time is entirely eliminated, and the only question left for consideration is whether by its actions the insurer waived the provisions as to notice.

4. Evidence examined, and *held* that no waiver has been proved.

5. Defenses: CONSISTENCY. Where the insurer denies that the policy was in force at the time of the loss, a defense which is based upon the conditions of the policy, such as that proofs of loss were not furnished in accordance therewith, is inconsistent with another defense which asserts that no policy was in force at the time of the loss.

6. Insurance Policy, Action on: PLEADING: WAIVER. In an action upon an accident insurance policy, where no notice of the accident was given within the time limited by the by-laws of the association, a denial of liability for the reason that no accident occurred, made after this time had expired, is not a waiver of such a provision specifying that no claim for injuries shall be valid unless written notice of the accident shall have been given within 15 days from the happening thereof.

7. Pleading: AMENDMENT BY INTERLINEATION. The practice of amending pleadings by interlineation or erasure is not to be commended, and should not be favored.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Reversed.*

O'Neill & Gilbert and *T. J. Doyle*, for plaintiff in error.

L. C. Burr, contra.

LETTON, C.

The plaintiff in error, defendant below, is a mutual fraternal beneficial association, organized under the laws in this state, and having its place of business in the

* Rehearing allowed. See opinions, pp. 674, 680, *post*.

city of Omaha. Its purpose is to furnish indemnity on account of death or disability resulting from injuries received from accidental means. The plaintiff below was Hays B. Tomson, now deceased. The action is now revived in the name of Isabelle McHenry Tomson, as administratrix of her deceased husband's estate. Tomson became a member of the defendant association in 1893, and was a member in good standing at the time of the occurrence of the accident or sickness by reason of which he claimed the association became liable to him upon said certificate. On February 18, 1902, in the usual conduct of his business as a traveling salesman, Tomson was driven in a two-horse buggy by a young man, from Weston, in Saunders county, to Bruno, in Butler county, in this state. At one point in the road, it is claimed that the horses were about to run away and the buggy was drawn rapidly over a very rough piece of road; that he was thereby shaken and jostled violently about in the buggy; that a blood vessel of his brain was ruptured, causing a slight hemorrhage from which he then suffered; that a few days afterwards, at his home in Lincoln, the hemorrhage was repeated, causing paralysis of one side of his body and bringing on a permanent total disability. He sought to recover from the defendant association upon the ground that the injury he suffered was accidentally produced and that therefore he was entitled to the benefits specified in his contract of membership. A trial was had and judgment rendered in his favor in the district court, from whence the association has prosecuted error to this court.

Plaintiff in error argues in its brief, first, that notice of the alleged accident was not given nor waived; second, that the defendant was entitled to judgment under the pleadings; third, that Tomson was not totally disabled for a period of two years or over, and therefore was not entitled to the $2,500 benefit allowed him by the jury; fourth, error in the introduction of evidence, and, fifth, that the evidence was not sufficient to support the ver-

dict. The greater part of the argument has been devoted to the question of notice. To determine this question will require an examination of the pleadings.

The petition alleged that Hays B. Tomson became a member of the defendant association in 1893, and that in that year it issued to him its benefit certificate whereby he became entitled to the indemnity afforded by its provisions against accident, and that he had paid each and every assessment made against him from that time, and has kept and performed all of the terms and conditions of said membership certificate or policy on his part to be kept and performed. The petition sets forth further in detail the accident by which he claims he was permanently injured on the 18th day of February, 1902, and further pleads that on the 18th day of February, 1902, he notified the defendant company of said accident, and also upon the 25th of February, 1902, and in March, 1902, he again notified the company of the accident; that it denied liability and claimed that plaintiff was not injured by an accident at all, and thereby waived the provisions of the constitution and by-laws of the association as to notice of the accident, and it is estopped to claim every advantage therefrom. The answer, omitting certain objections to jurisdiction set forth therein, admits that the association executed a certificate of membership to the plaintiff in 1893, alleges that plaintiff has at no time given it notice of any accident, and denies each and every allegation contained in the petition and not hereinbefore admitted. After this answer was filed, two amendments were made by leave of court, admitting that the plaintiff had a hemorrhage of the brain, but alleging that the hemorrhage was caused by disease and that the defendant was not liable on account of said hemorrhage, admitting also that the plaintiff was totally disabled and unable to perform any of the duties pertaining to his usual occupation for a period of one year, beginning on the 22d day of February, 1902; and after the trial was begun, in order to avoid any question as to the issue of membership, a

further amendment was made by leave of court admitting that at the date of the alleged injury the plaintiff was a member in good standing in the defendant association. The reply was a general denial, with the further allegation that after receiving the notice and claim of the plaintiff the executive board of defendant duly met, and the plaintiff's notice and claim of accident came before it for consideration of allowance or rejection, and the same was rejected by a unanimous vote of said board; that defendant denies that plaintiff was injured by an accident, and that defendant is estopped to claim and has waived the provisions of the by-laws and constitution as to notice.

The proof showed that up to the time that Tomson started upon the drive mentioned, he had been a stout, healthy man. He was 54 years of age and testifies he had never had a doctor in his life that he remembered of; that the road at one point had been frozen and thawed, had been cut up by the wheels of wagons while soft, and had frozen again while in this rough condition; that when they reached this rough ground, the horses were on a dead run and about to get away from the driver. He further testifies that in going over the rough ground he was thrown backward and forward, from one side to the other, and while going over it, it felt to him as if some one had turned a mirror in his eyes and he could hardly see any thing the balance of the afternoon; that it was just a perfect glitter all that afternoon and clear up to the next day and that he was prostrated and nervous; that when they reached Prague, the first town after going over the rough ground, he was feeling dizzy and that he had a colored sensation in front of his eyes and could scarcely see, and that he had the same restless feeling and snappy feeling in front of his eyes all the time until after his return home a day or two afterwards.

The testimony further shows that at his home he was stooping over to take something out of the lower drawer of a chiffonier, when he became dizzy and faint and had

an apoplectic stroke which disabled him entirely for a year. The drive took place on the 18th of February, and the second attack upon February 22. Upon April 8 a letter was written to Arthur L. Sheetz, the secretary of the association, by Hays Tomson, Jr., the son of defendant in error, the following portion of which is in evidence: "Dear Sir,—My Father who is a member of the W. T. A. A. has been very sick for the last six weeks and I write to ask if he is eligible for insurance. He made a drive from Weston to Prague, a distance of about forty miles, with the snow on the ground, behind a pair of bronchos on Monday or Tuesday. From that time on his eyes kept continually blurring and he felt sick until Saturday evening when he lost control of his arms and legs. * * * Hoping to hear from you, I remain, Hays Tomson, Jr."

On April 9 the association replied to this letter as follows: "Mr. Hays Tomson, Jr., 431 South 12th St., Lincoln, Nebraska. Dear Sir: Your letter without date with reference to your father's illness is at hand. In reply will state that you do not mention any accident which your father had, and the association pays only where the disability is caused by accidental injuries. The clause requiring notice to be given within 15 days after the accident applies in all cases where it is possible to give such notice. However, since there seems to have been no accident in this case this question would not be of importance, however, as above stated the association does not pay indemnity for disability except such disability as may have been caused by reason of accidental injuries. Yours truly, Arthur L. Sheetz, Secy."

On April 22 Mrs. Tomson wrote the association as follows: "Lincoln, April 22, 1902. Mr. Arthur L. Sheetz, Omaha, Nebr., Dear Sir: When my husband Hays B. Tomson, left Malmo, February 18, he was perfectly well. He made a drive over very rough frozen roads of 25 or 30 miles. The driver made rapid time and the jarring was violent and severe. It is his belief that this 'shaking up' caused the hemorrhage

which resulted in the complete disability following and which still continues. He has been unable to send you notice because his physician, Dr. Mitchell, has required as nearly complete mental and physical quiet as possible. Very sincerely, Isabelle Tomson, 431 South 12th St."

On May 6 the association made the following reply: "May 6th, 1902. Mrs. Tomson, 431 South 12th St., Lincoln, Neb. Dear Madam: Your letter of April 22d has been referred to our executive board and I am instructed to advise you that as Mr. Tomson met with no accident which caused his recent disability he is not entitled to any benefits from the association. Your letter does not say that any accident happened unless the fact that Mr. Tomson rode over a rough and frozen road could be classed as an accident. If it is insisted that this is an accident we will be obliged to also rely upon failure to give the required notice of the accident within 15 days. We believe that by no fair construction of our by-laws could Mr. Tomson's disability be held to be the result of any accidental injuries. While we sympathize with you and Mr. Tomson in this misfortune we regret that the disability is not such as is contemplated by our constitution and by-laws. Yours truly, Arthur L. Sheetz, Sec'y."

The records of the executive board show, under date of April 26, "It was moved and seconded that the claim of H. B. Tomson, Lincoln, Nebraska, be rejected. The motion was carried by unanimous vote." The constitution and by-laws of the association provide that no claim for injuries received shall be valid unless written notice of said accident shall have been received at the office of the association within 15 days from the happening thereof.

It will be seen that no notice of any accident was given to the association within 15 days as is required by these provisions. It may further be noted that nothing is alleged in the petition or reply which sets forth any reason or excuse why notice was not given within the 15 days. No attack is made by defendant in error in the pleadings upon the reasonableness of this requirement, but it is

claimed that by its actions the association waived the limit of time, and also waived any further or more specific proofs and notice of loss than those contained in the letters hereinbefore set forth.

The defendant in error relies upon the doctrine laid down in *Omaha Fire Ins. Co. v. Dierks,* 43 Neb. 473, and subsequent cases following and adopting the rule that, where the insurer denies all liability for the loss and refuses to pay the same upon grounds other than the failure of the insured to give notice of the loss, such denial and refusal avoid the necessity of such notice. The reason given for this rule, however, is that since the insurer denies that the policy was in force at the time of the loss, a defense which is based upon the conditions of the policy, such as that proofs of loss were not furnished, is utterly inconsistent with another defense which asserts that no policy was in force at that time. Plainly, the insurer can take no advantage of the provisions of a contract which he claims does not exist. The cases following the *Dierks* case rest upon this principle of the defenses being inconsistent, because in each case the insurance company claimed that the policy was not in force at the time of the loss. In the instant case no claim is made that the certificate was not in force at the time of the loss. Defendant in error argues that the pleadings, up to the time of the amendment in open court, denied that Tomson was a member of the association, but we do not thus regard them and think that that issue was not raised. The allegations of the answer, taken as a whole, do not deny membership. The question then arises whether a defense that no notice was given within the time limited and a defense that no accident ever happened are inconsistent with each other. We think they are not. Under section 100 of the code, the defendant may set forth in his answer as many grounds of defense as he may have. In *Home Fire Ins. Co. v. Decker,* 55 Neb. 346, which was an action against a fire insurance company upon a policy, the petition admitted that proofs of loss had not been

furnished, but alleged that the condition in relation thereto had been waived. The first paragraph of the answer denied generally the allegation of the petition, the second alleged that the plaintiff had not complied with the conditions of the policy as to notice and proofs of loss; the third, that proofs of loss were not furnished within the time limited in the contract; and fourth, that the plaintiff caused the building to be burned. This court said (SULLIVAN, J.):

"We entirely agree with counsel that the several grounds of defense stated in the answer were not inconsistent. The proof of one would have no tendency whatever to disprove either of the others. A defendant may, under our system of pleading, allege as many grounds of defense as he may have, subject only to the condition, implied from the requirement in regard to verification, that such defenses shall not be so repugnant that if one be true the other must be false. *Blodgett v. McMurtry,* 39 Neb. 210; *Citizens' Bank v. Closson,* 29 Ohio St. 78; *Pavey v. Pavey,* 30 Ohio St. 600; *Nelson v. Brodhack,* 44 Mo. 596; *McAdow v. Ross,* 53 Mo. 199."

A defense of failure to give notice within the time limited, and a defense that no accident occurred, are not inconsistent with each other. The proof of one would in nowise affect the proof of the other. They may both be true or only one of them may be true. The facts in this case therefore do not fall within the rule established in the *Dierks* case, *supra.* When an insurer, before the time for giving notice expires, absolutely denies liability upon a policy, there is reason for the rule that a denial of all liability on the policy waives the giving of notice. The law does not require a vain thing; hence, where the insurer knows of the loss and denies all liability before the time of giving notice expires, the giving of notice or of proofs of loss would be useless. This rule, however, cannot apply where nothing has been done by the insured to render the giving of notice a useless action before the time has expired in which notice is required to be given.

While the petition alleges the giving of notice to the defendant through its vice-president within 15 days' limit, no proof of this was introduced at the trial. The only notice of any kind received by the company therefore was the two letters hereinbefore set forth. The answer denies the receipt of notice. The reply denies generally the allegations of the answer, and sets forth facts by which it is alleged the defendant "did waive and forego all the provisions of the policy, by-laws and constitution in respect to notice and is estopped to claim any advantage therefrom."

Under the rule laid down in *Dwelling House Ins. Co. v. Brewster,* 43 Neb. 528, that any allegation of the answer to which the reply pleaded a waiver and estoppel, or matter to avoid its effect, must be treated as admitted, we think that the pleadings in effect admit the failure to give notice within the time specified and rely upon a waiver or estoppel. As before noted, the pleader does not allege or rely upon the inability of Tomson arising from his injuries to give the required notice; and hence the principles laid down in *Woodmen Accident Ass'n v. Pratt,* 62 Neb. 673, are not applicable. The question presented is not whether the circumstances excuse the giving of notice within the time, but whether, when no notice actually was given within the time, and no excuse is pleaded, the excuse can be considered as being within the issues. In the *Pratt* case, *supra,* the court say:

"We are also cited to the case of *Heywood v. Maine Mutual Accident Ass'n,* 85 Me. 289, 27 Atl. 154, in support of the contention of the defendant. In that case the question arose on demurrer to the petition, which disclosed that notice was required by the terms of the policy sued on, and that none had, according to the pleading, been given, nor was any excuse or reason pleaded for not giving the notice. It being, for the purpose of the question decided, admitted that no notice had been given and no excuse existed for failure to give the notice, the question could not well be decided otherwise."

Since the pleadings, as we construe them, admit that no notice was given, and rely upon a waiver or estoppel by the insurer, the question of excuse or of whether notice was given within a reasonable time is entirely eliminated, and the bare question left for consideration, whether by its actions, the insurer waived the provisions as to notice.

The first letter to the association, which was written by the son, stated, in substance, that his father had been *sick* for six weeks; that he drove 40 miles with snow on the ground, that from that time his eyes kept blurring and he felt sick, until Saturday night, when he lost control of his arms and legs. The association replied to this letter, in substance stating that the writer mentioned no accident. That the 15-day provision applied in all cases where it was possible to give notice; that the association did not pay except for the result of accident. From these letters it is apparent that no notice of accident was given to the association thereby, and that it did not consider or accept the letter as a notice. Further, it expressly stated that the 15-day notice applied in all cases where possible to give it, thus indicating an intention to insist upon the rule. The second letter, written April 22, evidently seeking to set forth in detail the accident claimed, stated the facts and gave a reason and excuse why notice was not given. On April 26 the executive board met, the two letters were evidently treated as a claim for indemnity and the record of the proceedings shows that the claim of Hays B. Tomson was rejected. No reason is assigned for the rejection upon the records, but the letter of May 6 from the secretary to Mrs. Tomson expressly puts the rejection upon the ground that Tomson had met with no accident and that the association also relied upon failure to give notice. A claim envelope was introduced in evidence which showed an indorsement, "Claim of H. B. Tomson," and "Claim filed April 9," and in pencil in the handwriting, apparently, of the secretary, "No Accident." "Rejected." These are all the facts in evidence as to the giving of notice and the alleged waiver. We can see no

waiver here. The association from the first insisted upon notice, and after the second letter was written, which was the first which set forth an extraneous or violent cause for the injury, it disclaimed liability both on account of the fact that there was no accident and further because of lack of notice. We can see no inconsistency in this conduct. It is not a case where the insurer claimed a forfeiture and at the same time acted as if the policy were valid. No question of forfeiture is presented. It treated the certificate as valid, but insisted that nothing had occurred which set its provisions as to indemnity in motion. This is the position it has taken from first to last, both before and after this action was begun. Neither forfeitures nor estoppels are favored in law, so no presumptions are to be indulged in in order to aid either insurer or insured as this case is presented to us. Under these facts neither waiver nor estoppel has been shown as to the provisions of the constitution in regard to notice, and the association has a right to rely upon the terms of the contract.

As has been stated, as the pleadings now stand we cannot consider whether the 15-day requirement is reasonable, nor whether the circumstances offered good and reasonable excuse for the failure to give the notice. The questions presented are not the same as in *Woodmen Accident Ass'n v. Pratt, supra,* and with the rules there enunciated we are content. The trial court instructed the jury that the defendant waived all that part of the policy with respect to formal and technical notice of an accident within 15 days, and that that question should not be considered, which was duly excepted to by defendant. In the view we take of this matter this instruction was prejudicially erroneous.

2. The plaintiff in error claims it was entitled to judgment under the pleadings. This claim is based upon the contention that the reply admitted paragraph 5*a* of the answer, which charged that Tomson's injury was occasioned by disease and that the association was not liable

on account of the same. In this connection a serious controversy arose between counsel as to whether an interlineation in the reply in fact made this admission. This matter was decided in this court upon a motion to strike a part of the transcript, and since the effect of the ruling upon the motion was to leave the reply denying this allegation, this contention is not well taken.

3. Considerable controversy has arisen in this case by reason of the somewhat confused manner in which amendments to the pleadings were made while the cause was pending in the district court. Oral charges in open court, affidavits and counter-affidavits have been made with reference to the time when certain interlineations and erasures were made. While these facts are not material to a decision of the case, we believe it advisable at this time to criticise this method of making amendments. In this day and age, when the stenographer and typewriter are adjuncts of almost every lawyer's office, there is no excuse for pleadings being interlined and erased, having slips attached to them, or any other like mutilation being made. It often happens that in the hurry of a trial an amendment may be permitted to be made by interlineation, but before the case is finally submitted the parties should be required, if it is possible to do so, to file clear copies of the papers thus amended. In this way much dispute, ill feeling, charges and counter-charges might be dispensed with. The practice of amending pleadings by interlineation or erasure is not to be commended, and should not be favored.

We recommend that the judgment be reversed and the cause remanded.

OLDHAM, C., concurs.

AMES, C., concurs only in the result.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

The following opinion on rehearing was filed May 17, 1905. *Judgment of reversal vacated. Judgment of district court affirmed:*

1. **Pleading:** PETITION: REPLY. A plaintiff may, subject to liability to attack by motion or demurrer, plead in his petition matter in avoidance of an anticipated defense, and may supplement the same in his reply by allegations not inconsistent therewith.

2. ———: CONSTRUCTION AFTER JUDGMENT. Pleadings after verdict and judgment will, if not previously attacked, be liberally construed for the purpose of upholding the result reached by the court and jury.

3. ———: WAIVER. If an insurance company, sued for an alleged loss, denies the loss, it waives proof of notice of the same.

4. **Action on Insurance Policy:** NOTICE. If an insurance company has actual knowledge of a loss, within the time stipulated in the policy for the giving of formal notice thereof, such notice is dispensed with.

AMES, C.

This case was formely before this court and decided by an opinion published, *ante*, p. 661. On the former occasion the cause was submitted on briefs without oral argument, but the facts are set forth at length in the opinion and need not to be here repeated. A rehearing was granted, and oral arguments thereon have been had, solely upon the subject of the construction of the pleadings, to which subject the present discussion will for the most part be confined.

At the time of the former decision we were united in opinion that if by the pleadings themselves or by the admissions of fact contained therein, the defendant, plaintiff in error, had waived formal notice of the accident, to obtain indemnity for which the action was brought, the judgment of the district court ought to be affirmed. The petition anticipates that failure to give such notice might, and perhaps would, be relied upon as a defense to the action, and pleads as an excuse therefor total mental and

physical disability as a consequence of and immediately following the accident continuously for a term extending beyond the period within which the notice was by the contract required to be given. But it further alleges that within that period a vice-president of the defendant called upon the plaintiff at his home where the latter was suffering from the disability complained of, "and plaintiff notified said vice-president of said company, and said company of said accident." It is insisted by the defendant that this latter allegation is inconsistent with and in effect a retraction of the former, but we think that such would be a too literal and technical construction. No attack was made upon the petition by motion or otherwise, and it is the settled rule of this court, sanctioned by decisions so numerous that citation of them is not requisite, that after a verdict and judgment, pleadings will be liberally construed for the purpose of upholding the result reached by the court and jury. It is obvious to our minds that what the pleader had in view and intended to allege was that the defendant, by the visit of one of its managing officers within a week after the happening of the accident, and by what the latter learned upon such visit by his observation of and conversation with the plaintiff, became aware and charged with notice and knowledge of the occurrence. It was in substantiation of the allegation as so interpreted that evidence was offered by the plaintiff and admitted on the trial, and we think that it is too late, after verdict, to object that such is not its true meaning. The above mentioned allegation in the preceding paragraph of the petition is in the following language:

That the accident "caused a hemorrhage of the brain, causing complete disability of the plaintiff, and from the effects thereof plaintiff became totally disabled, mentally and physically, helpless and nearly blind; was confined to his bed for nearly six months, and wholly unable to work, travel, or perform his business, or to personally visit or notify said company at Omaha, Nebraska."

We think these two allegations, the one following immediately after the other, ought, at any rate after verdict, to be considered and construed together, and to be held to charge, in effect, that the plaintiff was disabled by the accident from giving formal notice within the 15 days stipulated in the contract, but that within that time the defendant became fully aware of it by means of the visit of its vice-president.

The petition further alleges that after the visit of the vice-president, and on an unspecified day in March, the plaintiff notified the company of the accident and demanded indemnity therefor, but that in response "to said several notices" the defendant "denied that it was liable therefor and claimed that the plaintiff was not injured by accident at all, and thereby waived and did forego all that certain portion" of the contract, "in respect to formal and technical notice and of any notice at all of said accident and is now concluded and estopped to claim any benefit or advantage thereof as to notice of any kind in these premises." The evidence shows that the pleader was mistaken as to the date of this latter mentioned notice, and that the notice referred to was the letter of the son of the insured written to the secretary of the association under date of April 8, 1902, long after the expiration of the 15-day limit. There was therefore no intentional repugnancy between this last allegation and either of the preceding. There was no motion to make more definite and certain, and it is evident that both parties interpreted the allegation as a sufficient designation of the letter disclosed in the proofs. The reply of the secretary of the association to this letter fully sustains the petition. It explicitly denies that the insured had been injured by accident, and while calling attention to the requirement of notice within 15 days, remarks that because of the absence of accident, that feature "would not be of importance."

The answer admits that the plaintiff was suffering from the malady described in the petition, but alleges that the

same was due to disease, and not to accident, and alleges "that plaintiff has at no time given notice of any accident or accidental injury as required by said constitution and by-laws and by the contract between plaintiff and defendant." The reply avers that on or about the 26th day of April, 1902, the defendant, by a formal vote of its board of directors, "denied that plaintiff was injured by an accident; denied that defendant was liable to plaintiff for or on account of accident, well knowing of plaintiff's claim and of plaintiff's notice of same to defendant, and the defendant did thereby waive and forego all provisions of the by-laws and stipulations of the contract with reference to notice," and "is now estopped to claim any benefit or advantage thereof as to notice of any kind in the premises."

Upon mature consideration, after listening to oral argument, we are convinced that there is no necessary repugnancy between the reply and the matter above quoted from the petition. If it is true, as said in the former opinion, that there is no inconsistency between a denial of notice and a denial of the existence of anything of which notice could have been given, it is equally true that there is no serious conflict between an allegation that notice was waived and an allegation that there were circumstances within the knowledge of the parties which rendered a notice not requisite. The petition admitted in effect that a formal written notice, such as was contemplated and in most cases required by the contract, had not been given within the time specified therein, but it pleaded two excuses for the failure, or, at least, one excuse and one circumstance which rendered the formal notice not indispensable, to wit: First, that the plaintiff was disabled from giving the notice by the nature, gravity and duration of his injury, and second, that within the time limited by the contract for giving the notice, the defendant, through the visit and conversations of one of its managing officers, had an acquaintance with the precise facts, knowledge of which the notice, when given,

was designed to impart. Now, if these allegations are true, they are in no degree inconsistent with the claim that when some months later the plaintiff made a demand upon the association for indemnity, the latter regarded the question of notice, as its secretary had previously expressed it, as "not to be of importance," because, "as above stated, the association does not pay indemnity for disability except such disability as may have been caused by reason of accidental injuries," and "there seems to have been no accident in this case." Whether the reply strengthened in any degree the case made by the petition, may be doubted. The transactions of the 26th of April pleaded by it, and established by the evidence, would have been more accurately described as treating a formal notice as already waived than as constituting in themselves a waiver of one, and it is not unlikely that they might have been proved as an admission to that effect without having been especially pleaded; but however that may be, neither the pleading nor the proof of them was inconsistent with the allegations of the petition. It was held by this court in *German Ins. Co. v. Shader*, 68 Neb. 1, that it is competent for the plaintiff to anticipate a defense and plead waiver (or matter of avoidance) in his petition. This the plaintiff did, and the allegations of the reply, which the former opinion regards as an admission that no notice was given, now appear to us to be merely supplemental to and corroborative of the petition. If this view is correct, the decision in *Dwelling House Ins. Co. v. Brewster*, 43 Neb. 528, cited in the former opinion, is not in point. *German Ins. Co. v. Shader, supra,* is authority for holding that a petition and reply, in so far as they treat of the same matter, are to be construed together, and under the liberal rule above adverted to they will not be treated as in conflict with each other unless necessarily so. It does not appear that there is any necessary inconsistency in the instance under discussion.

The facts stated in the former opinion, and established

by practically undisputed evidence, are, we think, conclusive to the following effect: That within a week after the plaintiff received his injury he was visited by one of the managing officers of the defendant, and that through the latter the defendant then acquired a knowledge of the nature of the plaintiff's disability and the circumstances of its cause, or at least origin; that within about six weeks afterwards a son of the plaintiff called the matter to the attention of the defendant's secretary, by the letter of April 8, and was promptly rebuffed by the latter by an emphatic denial and repudiation of the claim that the plaintiff's disability was due to accident; and that such denial was treated as the sole ground for the rejection of the claim by the formal action of the board of directors on the 26th of the same month. The answer admits that "plaintiff was totally disabled and unable to perform any part of the duties pertaining to his usual occupation for a period of one year, beginning on the 22d day of February, 1902," the second day following the accident. Furthermore, the answer, after having affirmatively alleged that the defendant is excused from payment by section 6, article 8 of its constitution and by-laws, because the disability complained of was due to disease, concludes with the following: "Further answering said petition the defendant denies each and every allegation therein contained not hereinbefore specifically admitted," and the one important allegation of the petition not specifically or otherwise admitted is, that the disability of the plaintiff was due to accident, so that fact is put distinctly in issue.

We conclude, therefore, that the case falls clearly within both of the main principles adopted by this court in *Omaha Fire Ins. Co. v. Dierks,* 43 Neb. 473: First, that formal notice of loss was immaterial, because the company had actual notice through the presence of its agents at the fire, and acted thereon, though refusing to make payment for that reason; and, second, because the company by its pleading denied liability on the ground that

the property destroyed was incumbered by mortgage at the time of the fire. It can, of course, make no difference with the application of this latter rule whether the issue of nonliability is raised by special allegation or by general denial, or whether the absence of liability is contended to be due to forfeiture, as in the case cited, or to the nonoccurrence of the accident out of which it is alleged to have arisen, as in this case. In either case the plaintiff would be driven to the expense and labor of the trial of an issue that would be wholly immaterial in the absence of liability for want of notice. In short, if this court adheres to the opinion in *Omaha Fire Ins. Co. v. Dierks, supra,* the judgment in this case must be affirmed as in harmony therewith; but if that decision is overruled, there must still be an affirmance, because, by the opposite rule for the construction of pleadings, the reply is not inconsistent with the petition, and the undisputed evidence establishes the fact that the defendant repudiated the claim on the ground that there had been no accident.

We are satisfied with the opinion in the case cited, and recommend that it be adhered to and that the former decision of this court in this case be vacated and set aside, and the judgment of the district court affirmed.

OLDHAM, C., concurs.

By the Court: For the reason stated in the foregoing opinion, it is ordered that the former decision of this court be vacated and set aside, and the judgment of the district court

AFFIRMED.

The following opinion on second motion for rehearing was filed October 19, 1905. *Rehearing denied:*

PER CURIAM: The third paragraph of the syllabus appears to be an inaccurate statement of the law. If the insurance company has no notice, express or implied, of any claim of loss until suit is begun therefor, it may un-

doubtedly answer, both that there was in fact no loss, and that the claimants never gave any notice of the alleged loss pursuant to the terms of the policy. The syllabus is modified accordingly.

The conclusion reached, however, appears to be justified on the grounds fully stated in the opinion, and the motion for rehearing is

OVERRULED.

JAMES J. SKOW V. JOSEPH L. LOCKE.

FILED NOVEMBER 16, 1904. No. 13,625.

Chattel Mortgage: SALE: CONVERSION. A mortgagee, after due notice, may sell a sufficient amount of the mortgaged property to satisfy the mortgage debt; but if he sell more than sufficient to satisfy the same and costs necessarily incurred, he will be liable for conversion of such excess. *Omaha Auction & Storage Co. v. Rogers*, 35 Neb. 61, followed.

ERROR to the district court for Gage county: JOHN S. STULL, JUDGE. *Affirmed.*

Sackett & Spafford and *E. O. Kretsinger,* for plaintiff in error.

J. E. Cobbey, contra.

LETTON, C.

This was an action of conversion brought in the district court for Gage county by Joseph L. Locke, defendant in error, as plaintiff, against James J. Skow, plaintiff in error, as defendant. The petition, in substance, alleged that on and prior to the 19th day of March, 1900, the plaintiff was the owner of certain personal property in the petition described; that the property was reasonably worth $1,500; that on or about the 19th day of March, 1900, the defendant, James J. Skow, unlawfully took and

illegally and wrongfully converted the same to his own use, to plaintiff's injury and damages in the sum of $1,500, wherefore plaintiff prays judgment, etc. The defendant answered, pleading a prior adjudication in the district court for Gage county between the same parties for the same property, whereby the ownership and right of possession of the same property was finally adjudicated in favor of the defendant James J. Skow; that the judgment in said case is *res adjudicata,* and the plaintiff is estopped from bringing this action. He further denied generally every allegation in the plaintiff's petition. The reply was a general denial and a special denial of a former adjudication, coupled with a demurrer to the answer. Upon the issues thus made up, the cause was tried to a jury, and verdict and judgment rendered against the defendant therein, James J. Skow.

The evidence shows the following facts: That on the 1st day of June, 1898, Locke executed and delivered to Skow a chattel mortgage upon the property described in the petition to secure an indebtedness of $1,132. On the 19th day of March, 1900, claiming a default in the conditions of the mortgage, Skow began an action in replevin in the county court of Gage county to obtain possession of a large part of the goods and chattels described therein. This case was tried in the county court, and afterwards appealed to the district court; the trial in that court resulting in a verdict which found that the right of possession of the property in controversy was in Skow at the beginning of the action, and found the value of his special ownership of the property at that time to be $36.95, and his damages for the detention of the property to be one cent. No motion for a new trial having been filed, a judgment was entered upon this verdict. No proceedings in error were brought and the judgment is final. A few days after this judgment was rendered, this action was commenced. The defendant contends that conversion was not the proper form of action, and that the action should have been for an accounting; that the right of possession

was in him at the time the action was begun and had been so adjudicated, and that the court erred in its instructions to the jury and in the admission of evidence.

1. The court instructed the jury at the request of the plaintiff below as follows: "7. The jury are instructed that the verdict and judgment in the replevin case offered in evidence do not constitute a bar to this action," to which exception was taken; and refused to instruct the jury at the request of the defendant Skow, that if they found that the right to the possession of the property in controversy was adjudicated and found to be in the defendant Skow by the former judgment of the court, then they should find for the defendant upon the items which were in controversy in both cases, to which refusal the defendant excepted. The court, however, further instructed the jury at the plaintiff's request as follows: "5. The court instructs the jury that in this case both parties are bound by the verdict and judgment rendered in the replevin suit testified about, and by the amount found to be due upon the chattel mortgage from Locke to Skow, to wit, $36.95, and one cent damages. And if the jury believe from the evidence that said defendant Skow took and sold under his said chattel mortgage property more than sufficient to pay the said amount of $36.95 and one cent damages so due him, together with the reasonable expenses of taking and selling enough property to satisfy his said claim and such expenses, if any such expenses have been proved, then the jury will, from the evidence before them, find the reasonable value of all the property taken under said chattel mortgage at the time taken, and from such amount deduct the said amount of $36.95 and one cent damages and the amount of such reasonable expenses as above defined, if any such are proved, and find the balance with interest thereon from the date of such sale at the rate of seven per cent. up to the first day of the present term of this court, on September 14, 1903, as the amount due to Locke from defendant Skow upon the property included in said mortgage. And your verdict

will be for said amount together with any other amount you may find to be due under these instructions and the evidence." Defendant excepted to the giving of this instruction. From the statement of facts recited, it will be seen that at the time alleged in the petition as that upon which the conversion took place, to wit, on or about the 19th day of March, 1900, the plaintiff in error, Skow, was entitled to the possession of the property, and that this right of possession was conclusively established in him by the verdict and judgment of the court. The evidence shows, however, that the value of his special ownership was $36.95, and that he had in his possession property to the value of several hundreds of dollars belonging to the defendant in error.

In *Omaha Auction & Storage Co. v. Rogers,* 35 Neb., 61, this court held as follows: "A mortgagee, after due notice, may sell a sufficient amount of the mortgaged property to satisfy the mortgage debt; but if he sell more than sufficient to satisfy the same and costs necessarily incurred, he will be liable for conversion of such excess." Citing *Charter v. Stevens,* 3 Den. (N. Y.) 33.

The New York case was an action of trover for a horse which the defendant took from the plaintiff's possession under a chattel mortgage. The mortgage had not been fully paid when the property was taken. After the defendant had taken the property, he sold it at auction under the mortgage in several parcels, the horse in question being the last which was sold, and it appeared that before the sale of the horse enough had been raised by the prior sale to pay the balance due on the mortgage with interest and expenses. Defendant insisted that the defendant's title to the property had become absolute at law on account of the nonpayment of the mortgage debt. The trial judge charged the jury that, although the taking of the property was lawful, yet, since at the time of the sale of the horse enough had been realized to satisfy the debt and expenses, such sale was a conversion of the horse; and the supreme court affirmed the case.

It did not appear at the trial of the instant case what particular items of property were first sold by the defendant, or that the provisions of the statute providing for the foreclosure by sale of property covered by chattel mortgages had been complied with. If the evidence had disclosed that the foreclosure proceedings had been had in all respects as provided by law, and if the identity of the property which had been sold before the amount necessary to pay the debt, interest and expenses had been realized had been shown, the instruction complained of would have been erroneous, since it was only the property remaining that defendant could have converted; but when such facts are not shown, then the rule laid down in the instruction is correct, and the defendant will be held to have received market value for the property he sold and applied in payment of the mortgage debt and will only be allowed to deduct the amount of his debt, interest and costs of sale from the market value of the entire property. When the defendant had sold enough property to pay the balance of $36.95, with interest, and the reasonable expenses of the sale, he had no further right or title to the plaintiff's property, and became a trespasser at once. It was his duty to return the unsold property to the true owner. An appropriation of it to his own use thereafter was a conversion for which an action will lie.

2. As to the former adjudication, it was immaterial in the case, except to settle that the defendant had the right of possession of the property until his special interest in the property, which was ascertained to be $36.95, was paid. The status of the parties with reference to the right of possession of the property was just the same as if no adjudication had been had and there was still $36.95 unpaid upon the mortgage debt. The defendant had the right to the possession of the property until the debt was paid and no longer, and this was in effect what was adjudged in the replevin case.

3. We have examined the other assignments of error and find no error prejudicial to the defendant.

We recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

H. K. SMITH V. JAMES G. CORRIGAN.

FILED NOVEMBER 16, 1904. No. 13,630.

Pleadings and evidence examined, and *held* that instruction complained of was not erroneous.

ERROR to the district court for Buffalo county: CHARLES L. GUTTERSON, JUDGE. *Affirmed.*

Hamer & Hamer, for plaintiff in error.

H. M. Sinclair, contra.

LETTON, C.

This action was brought by the plaintiff in error to recover the value of two horses which he alleges the defendant, Corrigan, together with one J. H. Glazier, took in the fall of 1894 to winter in Cherry county, Nebraska; that afterwards the defendant purchased all of Glazier's interest in the business, and in May, 1895, Corrigan returned to him one of his horses, but that he told plaintiff that, while on the way down from Cherry county with a number of horses, the other two belonging to plaintiff had broken away from the bunch, and that as soon as he disposed of the other horses he would go back and get these. That defendant did not try to get the horses, but allowed them to become lost. He asks judgment for their value. The answer was a general denial. A verdict and

judgment in favor of defendant were rendered, and the plaintiff prosecutes error to this court.

The only ground of complaint alleged in the plaintiff's brief is that the trial court's theory of the case was wrong, and that the issues presented to the jury were not in the case. He argues that the plaintiff's right to recover was based upon the failure of Corrigan to perform the promise to go up to Cherry county and get the two horses which had strayed, and that, consequently, the third instruction given by the court which recited, in substance, the allegations of the petition, and instructed the jury that, if the plaintiff had established all of these facts by a preponderance of the evidence, then he was entitled to recover the reasonable value of the horses, but, on the contrary, if he has not so established such facts they should find for defendant, was erroneous, because not properly stating the issue.

The evidence showed that Glazier and Corrigan, in company with each other, took a number of their own horses and horses belonging to others from the neighborhood in which they lived in Buffalo county to Cherry county to winter, feed being scarce in the locality in which they lived. The plaintiff asserts that in this enterprise Glazier and Corrigan were jointly interested, and that his contract was made with them jointly. On the other hand, both Corrigan and Glazier testify that, while they took the horses to Cherry county together and kept them in the same herd upon the range and fed them together, still, that each bunch of horses was branded in a different manner, that each individual hired men to take care of his own part of the stock, and that there was no partnership or joint interest between them; that the contracts each had made with parties in Buffalo county to winter stock were made upon their individual account, and not made in partnership. This evidence was corroborated by other witnesses. Upon this testimony the jury found for the defendant, and it is not claimed that the evidence is not sufficient to sustain the verdict.

Whatever the intention of the pleader may have been, the record clearly shows that the case was tried upon the theory that the allegations of the petition, that the contract was made jointly with Corrigan and Glazier, that Corrigan afterwards purchased Glazier's interest in the contract, and that Corrigan negligently allowed the horses to stray and become lost, were the material facts required to be proved by the plaintiff in order to recover. If, as is now stated, the intention of the pleader was to base the right to recover upon the failure to perform the promise to go up to Cherry county and get the horses, it is sufficient to say that upon this allegation alone no recovery could be had; such a promise made without consideration by a party upon whom rested no duty or obligation to perform the same being a mere *nudum pactum*. However, it is evident from the pleadings, from the proceedings of counsel in the introduction of testimony and in their objections to the same, from the rulings of the court, and from its instructions to the jury that the case was actually tried by all parties upon the theory that the issue was whether Corrigan and Glazier were joint contractors, as set forth in the petition. This being the fact, no error was made in the instruction complained of, and the case was properly submitted to the jury. We find no error in the record, and recommend that the judgment of the district court be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CITY OF BEATRICE V. WILLIAM W. WRIGHT, COUNTY TREASURER, ET AL.

FILED DECEMBER 7, 1904. No. 13,529.

1. **Statute:** VALIDITY. The constitutional validity of an act of the legislature is to be tested and determined, not by what has been or possibly may be done under it, but by what the law authorizes to be done under and by virtue of its provisions.

2. **Tax Sale:** NOTICE. No notice is required to be given of a sale of real estate for taxes delinquent for a period of over five years, which is to be sold under the provisions of chapter 76, laws of 1903.

3. ———: ———. The fact that no notice of sale is required other than that contained in the act itself does not render it void as taking property without due process of law.

4. **Tax Sale:** NOTICE. The notice given and required under the provisions of the general revenue act, section 193 *et seq.*, article I, chapter 77, Compiled Statutes, 1903 (Annotated Statutes, 10592), for the sale of real estate for delinquent taxes is not a notice of a sale under the special provisions of said chapter 76, laws of 1903.

5. **Lien of Taxes.** Taxes and special assessments levied on real estate under the general revenue laws of this state create no personal liability against the owner for the payment of which a judgment *in personam* can be obtained. It is the property alone which is assessed that can be resorted to and taken in satisfaction of the taxes levied against the same.

6. ———: RELEASE. A release or discharge of the lien of taxes or any portion thereof assessed and levied on real estate operates as a release, discharge and cancelation of such taxes for any and all purposes.

7. **Statute:** CONSTITUTIONALITY. The provisions of the act of the legislature, chapter 76, laws of 1903, examined, considered, and *held* to be in conflict with section 4, article IX of the constitution, which declares that the legislature shall have no power to release or discharge any person or corporation from their or its proportionate share of taxes, nor shall commutation of such taxes be authorized in any form whatever.

ORIGINAL suit to enjoin defendant, treasurer of Gage county, from selling certain lands for less than the full amount of the taxes levied against them. *Decree for plaintiff.*

M. B. Davis, for plaintiff.

Griggs, Rinaker & Bibb, contra.

HOLCOMB, C. J.

This is an original action brought in this court for the purpose of enjoining the defendant, the county treasurer of Gage county, from perfecting an attempted sale of certain lots or parcels of real estate for a small portion only of the delinquent taxes assessed against the same, and from issuing certificates of sale of said real estate to the defendant Bibb, the purchaser, and from canceling the remainder of the taxes assessed against said property, and for other similar relief in order to make the injunction effective. The attempted sale of the real estate by the county treasurer which it is sought to have enjoined was made in pursuance and under the provisions of chapter 76 of the laws of 1903, being "An act to provide for the sale of lots and lands for taxes and assessments delinquent for five years or more and the execution of deeds for the same."

The pleadings consist of the petition, an answer thereto, and a demurrer to the new matter found in the answer. From the pleadings it is made to appear that three certain lots in the city of Beatrice had been assessed for general revenue purposes and for special taxes for local improvements, the whole amount, with interest, aggregating more than $3,300, and which had been due and delinquent for more than five years; that the amount of such delinquent taxes exceeded the assessed valuation of each tract against which assessed, and that the actual value of the premises exceeded the amount of the assess-

ments due and delinquent standing against the same. It further appears that on the first Monday of November, 1903, the treasurer of said county offered each of said lots or parcels of real estate for sale, for the delinquent taxes assessed against the same, to the highest bidder, and that the defendant Bibb bid the sum of $1 on each of said lots, and, no one else bidding, the treasurer declared each of them to be sold to the said defendant; and that the defendant Moschel, the owner of said lots, was present at said sale. The above are the only averments standing admitted by the pleadings which it is deemed necessary to incorporate in this opinion. The recent enactment of the legislature under which these proceedings were had provides, in substance, that, where taxes and assessments on any real estate shall have continued delinquent for a period of five years or more and the total amount thereof shall exceed the value of the property as returned by the assessor, then it shall be the duty of the county treasurer, commencing on the first Monday of November, and continuing from day to day, to offer said property for sale to the highest bidder for cash, and to issue a certificate of sale showing the purchasers to be entitled to a deed at the expiration of two years from the date of sale, provided, the property has not sooner been redeemed by the owner or a lien-holder. Such purchaser, it is declared, shall take the property purchased upon the payment of his bid, discharged of all liens for taxes and assessments delinquent up to date of sale; and the county treasurer shall, upon the sale of such property, cancel all taxes and assessments delinquent thereon at the date of the sale. It is then provided that the owner or any lien-holder may at any time have the right to redeem the property by paying to the county treasurer, for the use and benefit of the purchaser, the amount for which the property has been sold with 20 per cent. interest for a period of two years, if not sooner redeemed, and 10 per cent. thereafter. Provisions are made for the issuance of a deed at the expiration of two years from the date of sale, and the act is declared to

be cumulative and not exclusive in respect to the remedy for the enforcement of liens and the collection of delinquent taxes by the sale of the property or otherwise. Ch. 76, laws, 1903.

The validity of the law, the substance of which has just been given, is challenged on several different grounds, among them being the contention that its provisions are in conflict with section 4, article IX of the constitution; that it is amendatory in character, and, as such, in its passage and enactment there was a failure to comply with the provisions of section 11, article III of the constitution; that no notice is required for the sale of the real estate which is subject to sale under the provisions of the act; and that it operates to deprive the owner of his property without due process of law. Other objections are urged which we find it unnecessary to discuss or determine in the disposition of the case.

1. The principal contention of the plaintiff pertains to the alleged invalidity of the act under which the defendant, the county treasurer, is proceeding because it violates section 4, article IX of the constitution, which declares: "The legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

In answer to this objection it is insisted by counsel for defendants that the authority sought to be conferred by the act in question in no way conflicts with the provisions quoted; and that the sale of the property for delinquent taxes, as therein provided, and the cancelation of the tax remaining unsatisfied after such sale, do not operate as a release or discharge of such taxes, nor does the payment of a less amount than the taxes due effect a commutation of such taxes within the meaning of the organic law. Preliminary to a discussion of this, the vital question in

the case, it may be well to submit some observations in relation to the scope and effect of the act under consideration, and the proper rule of construction to be invoked in the determination of the question of its alleged conflict with the paramount law. In this connection it is urged by the defendants that the operation and enforcement of the law provides only for a due and orderly sale of real property against which the taxes are delinquent for five years or more for what it will bring in the open market, thus merging the statutory tax lien on the property in the title of the purchaser thereof, and thereby effectuating a release from the unsatisfied taxes, which, it is insisted, is manifestly an exercise of power properly belonging to the legislature and exclusively within its province. It may be stated, we think, that this might possibly be the result of the operation of the law in some instances, but, even if this be true, it would not upon the question of the constitutionality of the law be decisive of the matter. The vital point to be determined is, what is authorized to be done? The constitutional validity of the law is to be tested, not by what possibly has been or may be done under it, but by what can by its authority be done. What does the law authorize to be done under and by virtue of its provisions? This is the test and this is the doctrine to be applied in reaching a conclusion of the question of its validity. *Stuart v. Palmer,* 74 N. Y. 183; *Thomas v. Gain,* 35 Mich. 155; *Davidson v. New Orleans,* 96 U. S. 97; *County of San Mateo v. Southern P. R. Co.,* 13 Fed. 722; *Brown v. City of Denver,* 7 Colo. 305, 3 Pac. 455.

If the act, the validity of which is challenged, authorizes a method of procedure which in its workings results inevitably in the release of taxes and assessments justly due and for which the property is legally liable, or if in its enforcement it authorizes essentially and in substance a commutation of the taxes assessed against the real estate sold, this, under the doctrine of the authorities cited, brings it in conflict with the fundamental law, and its enactment must be held as being in excess of legislative power.

2. It is argued by the plaintiff that the law is invalid for that no notice of the proposed sale of real estate under the provisions of the act is required, and that none had been given before the sale of the lots complained of was made by the county treasurer, and therefore that he acted without authority. To this a twofold answer is returned by defendant's counsel: First, it is argued that whether or not notice shall be given is wholly discretionary with the legislature, the statute itself providing for a sale on the first Monday of November of all real property on which taxes are delinquent for over five years, and which, with interest, equal the assessed value of the property to be sold, is in itself sufficient notice, and that every property holder is charged with knowledge of these provisions, is bound to know whether the taxes have been paid, and that no other or different notice is required. For the purposes of this case it may be granted that no notice other than that which the law itself gives is required, in so far at least as the question of due process of law is affected. The assessment and levy of the taxes against the property having been made with an opportunity of the lot owner to be heard and for the correction of errors and irregularities, this constitutes the taking of his property for taxes by due process of law and, therefore, no further notice is required than that given by statute of the steps thereafter taken to enforce against the property the collection of the taxes or the sale thereof in satisfaction of the same. It is, however, urged, in the second place, that public notice was in fact given. This contention is predicated on the idea that lands subject to sale under the provisions of chapter 76, laws, 1903, for delinquent taxes, are necessarily included and advertised for sale with all other lands in the published notice required by the general revenue act to be given by the county treasurer, for the sale of all lands on which taxes are due and delinquent for one or more of the years previous to the time of giving such notice. To this view of the matter we cannot give our consent. The notice required to be given under the

general revenue law of the sale of all lands and lots for delinquent taxes, as provided by that act, is not a notice that any real estate will be sold under the provisions of chapter 76, the act under consideration. In fact, the notice given of the sale of lands generally for delinquent taxes negatives the idea that the real estate thus advertised will be sold under the authority conferred or sought to be conferred by the act, the authority of which is challenged in the case at bar. The general notice referred to is required to be given under the provisions of section 193 *et seq.*, article I, chapter 77, Compiled Statutes, 1903 (Annotated Statutes, 10592). The notice therein contemplated, and the notice actually given, is that the real estate against which the taxes are assessed and remain delinquent, or as much thereof as may be necessary, will be sold to satisfy not a part but all of the taxes, interest and costs, and that all lands and lots remaining unsold at the close of the public sale will be sold at private sale, as by law provided, and that, at the private sale thus contemplated, the land will be sold only to a person who will pay the amount of all taxes, interest, penalty and costs. In other words, the notice provides that real estate will be sold at public or private sale to those only who will bid the full amount of all taxes, interest and costs charged against the same. It is obvious that, under the notice thus given and the provisions of the general law referred to, the sale of real estate for delinquent taxes can be effectuated only by a payment of the full amount, including interest and costs, properly chargeable against the same. Instead, then, of the general notice serving to notify prospective buyers and the public generally that the real estate described will be sold, under the provisions of chapter 76, for whatever it may bring, whether more or less than the taxes due, on competitive bidding at a public sale, it provides just the contrary. The notice given in connection with the sale of lands under the general revenue law is specific on the point that the real estate, or such part as is necessary, will be sold for enough to pay

the full amount charged against the same, and, if not so sold, will be offered at private sale for a like amount—no more nor less. The provisions of the general revenue act for a sale of real estate for delinquent taxes is so different and inconsistent with the special provisions contained in chapter 76 that a notice of sale under the former conveys no information, direct or remote, of a contemplated sale under the provisions of the latter act. It is therefore apparent that, in dealing with the questions presented in the case at bar, the act must be treated as though no notice was given or required other than that contained in the act itself.

3. In the determination of the validity of this act and in construing its provisions and their relation to the fundamental law, we should bear in mind that under the laws of this state, as heretofore construed by this court, a tax, general or special, on real estate creates no personal liability or for the payment of which a judgment *in personam* could be obtained. The real property thus assessed is the only property that can be resorted to and taken in satisfaction of the taxes levied against the same. *Grant v. Bartholomew*, 57 Neb. 673; *Lynam v. Anderson*, 9 Neb. 367. It must follow, therefore, as a logical deduction from what has been said and these authorities that the legislative enactment, authorizing a release and discharge of the lien of taxes or any portion thereof assessed and levied on real estate, operates as a release, discharge and cancelation of such taxes for any and all purposes, and precludes the possibility of their satisfaction or collection by any other means, after the real estate against which the taxes are assessed is released from further payment. If, after a sale of real estate, in pursuance of the authority given by chapter 76, for any sum which may be bid therefor, the remaining portion of the tax assessed and levied against such property is canceled as to such real estate, it is canceled and satisfied altogether, and exists no longer as a liability against the property or the person of the owner or tax debtor.

4. We now reach the vital point in the controversy, and that is, does the enforcement of the provisions of the act under consideration operate to release and discharge taxes duly levied and assessed against real estate sold under its authority, or does it authorize such to be done, or the commutation thereof contrary to the constitutional restrictions on the power of the legislature? In the case at bar, real estate aggregating in value over $3,000 is sold for but $3, and taxes to the amount of over $3,000 are to be satisfied and canceled by the payment of that sum. The owner under this law, if it be a valid one, may, on the day succeeding the sale, redeem his property of the value mentioned by the payment of the $3 and the costs incidental to the sale and 20 per cent. interest on the purchase price for 24 hours, and thereby secure the release and cancelation of the aggregate amount of the taxes, as above stated, justly chargeable against the same. What the law provides for and what is authorized to be done under its provisions have a most vivid illustration in the concrete facts in the case at bar. That its provisions are mischievous and pernicious in the extreme, when we contemplate its practical workings, can hardly be doubted. This of itself, of course, does not warrant us in declaring the act invalid. The legislature possesses unlimited power, except as defined and limited by the organic law, and unless this act contravenes some of its provisions, the court cannot condemn it as invalid, be it fraught with consequences ever so mischievous. To uphold the validity of the act, it is argued by counsel for the defendants, if we understand them aright, that it is within the undoubted power of the legislature to authorize the sale of real estate for delinquent taxes for what it is worth in the open market or at public sale, even though the amount thus obtained be less than the amount of taxes due, and that the cancelation of the unsatisfied portion of the taxes after the sale thus had, or the extinguishment of the tax lien by a sale as thus made, would in nowise violate the section of the constitution heretofore quoted. We readily agree to the

correctness of the proposition. It is hardly to be doubted that, where real estate which for any reason has charged against it taxes in an amount greater than its value, it may be sold for such a sum as may be realized by a public sale upon notice inviting competitive bidding, under reasonable provisions calculated to bring about a fair sale, and, if the tax is not fully satisfied thereby, the cancelation and discharge of the remaining portion as a lien or an apparent lien on the property sold would violate no provision of the fundamental law. To say that such property cannot be sold for what it is worth in the markets, even though for a less sum than the assessments against it, is to defeat the very objects of taxation and lead to results the constitution itself sought to avoid. Unless the property can be sold for its market value, the result would be to exempt the property from all taxation for all time. This, of course, is an absurd result, and any construction leading thereto would be clearly inadmissible. The provisions of chapter 75, laws, 1903, an act which contemplates the accomplishment of substantially the same objects as the one under consideration, make provision for the sale of all such real estate, even though for less than the taxes charged against the same; and the validity of such legislation has very recently been upheld in this court. *Woodrough v. Douglas County,* 71 Neb. 354. Statutory provisions are sometimes found in general revenue acts, whereby county commissioners are empowered, when it is found, as is rarely the case, that the amount of taxes on a parcel of real estate exceeds its market value, to authorize the sale of the same for what may be found to be its fair value and what it will bring at public sale, and to cancel and discharge the portion of the tax remaining unsatisfied after such a sale. It probably would not be seriously contended that such provisions are in conflict with the fundamental law, or that they are not altogether in harmony therewith. Laws of the character referred to but serve to indicate the scope of legislative enactments, which may undoubtedly be passed without

trespassing upon constitutional provisions inhibiting legislation which operates as a release and discharge or commutaton of taxes. Reference to the act in question discloses that no judicial sale is contemplated. No method is pointed out for the ascertainment of the worth or market value of the property about to be sold, nor for preventing a sale for a mere nominal sum and regardless of its actual value. No notice of the sale is required to be given, and therefore none can be demanded as of right, either by the property owner, or by the public for whose benefit the taxes are levied, or by prospective bidders. No public sale even is required. No competitive bidding is invited. A sale is authorized, not publicly nor at public outcry, not in the open, but in the seclusion of the office of the treasurer, and for a mere pittance, wholly regardless of the value of the property to be sold, upon an offer by those who may voluntarily present themselves at the office and make a bid thereon. To all intents and practical purposes, real estate sold under the provisions of this act is authorized to be sold at private sale, and for any sum for which a bid may be received. The act does not provide for the sale of real estate for what it is worth, or what it will bring when exposed in the market, publicly and in open competition by those ready and willing to make such an investment. It is an invitation of the most pronounced kind to covinous transactions, inevitably resulting in the release of the property from just burdens of taxation by a sale thereof in form only. By such a sale the property is not exhausted for the satisfaction of the tax lien, nor sold for what it is worth in the markets. The act authorizes, in the strictest sense, a commutation of the taxes by the tax debtor. A friendly purchaser may obtain the land for but a fractional part of its actual value and of the amount of taxes chargeable against the same, whereupon the owner may, if the act be valid, pay to the treasurer the amount thus bid and be released and discharged of the remainder of the taxes due; and thus, by the payment of but a few dollars, which is received and

accepted in lieu of the larger sum, the entire tax is satisfied and canceled. The case at bar is analogous to and in principle controlled by the case of *State v. Graham*, 17 Neb. 43. In that case it is held:

"Under the constitution of this state requiring all taxes to be levied upon property so that each person shall pay his just proportion of the same, and prohibiting the legislature from releasing any of such taxes or commuting the same in any manner whatever, the legislature has no power whatever to authorize county commissioners to sell and assign certificates of tax sales of real estate purchased by the county for less than the amount of taxes due thereon, where the property if sold will bring the full amount of such taxes."

There, the county purchased real estate for delinquent taxes, and was authorized by the act then being considered to sell and assign such certificates of sale for not less than 50 per cent. of the amount thereof. This, it was held, contravened the provisions of the fundamental law. In this case authority is given to sell real estate for delinquent taxes for much less than 50 per cent. of the amount of the taxes, in fact, for any sum that may be bid, and for the owner to redeem by the payment of the sum bid, with the interest added, and thus effectuate a release and discharge of all the remaining portion of the taxes assessed against such property. In the former case, neither the owner nor the property was released of any portion of the taxes. All the act, in the case cited, sought to accomplish was to authorize an assignment of the tax sale certificates for not less than 50 per cent. of the face value. The act now under consideration authorizes the extinguishment of the entire tax upon the payment of a nominal sum.

In the last analysis, the owner of real estate upon which taxes are delinquent for five years or more is permitted to enjoy the advantage and benefit of a commutation and discharge of such taxes by paying to the treasurer, when the property is sold as in the act contemplated for the benefit of the purchaser, the amount of the bid, with in-

terest, nothwithstanding the property was worth in the market far more than the amount of such bid, and that such bid was only for a fractional part of the amount of the taxes chargeable against such property. The inevitable result is the releasing of property from taxes which are justly chargeable against it, and to permit the owner to commute the taxes, as thus assessed, by the payment of a less sum than that which is due to those for whose benefit they were levied. A statute inevitably leading to, and authorizing the accomplishment of, such results is in contravention of the section of the constitution heretofore quoted, and, for that reason, its enactment must be held to be of no force and effect. We are constrained, therefore, to hold that the act is invalid and unenforceable, and that the injunction prayed for ought to be granted and made perpetual, which is accordingly done.

JUDGMENT ACCORDINGLY.

SEDGWICK, J., concurring.

Chapter 76 of the laws of 1903 seems clearly to be unconstitutional. Following its provisions, the owner of real estate of the value of $3,000, upon which he has allowed the taxes to accumulate from year to year to the amount of the full value of the land, is able to procure the release and discharge of all of these taxes by the payment of $3, and the costs of sale. This result seems to be contemplated by the statute, and it certainly violates section 4, article IX of the constitution. There is no requirement that the property upon the sale must bring its market or salable value, and no provisions that seem intended to bring about such a result. This is sufficient reason for holding the act invalid, and for the judgment entered in this case.

2. The legislature of 1903 enacted a general revenue law, which is chapter 73 of the laws of that year. The legislature added several other provisions on the same

general subject; chapters 74, 75 and 76 are of that nature. If this chapter 76 were a valid act, it would, of course, be construed together with the other chapters upon this subject enacted at the same time. The acts so construed would provide for and define two classes of sale of land for delinquent taxes. One class would embrace all lands upon which the taxes had been delinquent for more than five years and exceeded in amount the value of the property. The other class would embrace all other lands upon which there were delinquent taxes. The provisions for notice of the sale of land for delinquent taxes are to be found in chapter 73. Section 194 of that chapter provides that a notice shall be published which shall describe the lands "as the same are described on the tax list," and stating "that so much of each tract of land or town lot described in said list as may be necessary for that purpose will, on the first Monday of November next thereafter, be sold by him at public auction at his office for the taxes, interest and costs thereon." Section 199 of chapter 73 provides, among other things, that:

"If no person bid for a less quantity than the whole, the treasurer may sell any tract of land or town lot to any one who will take the whole and pay the taxes and charges thereon." If this section also contained the substance of chapter 76, that is, if there were added to this section a proviso that "In all cases where the taxes and assessments upon any real estate appearing upon the tax list of any county shall have continued delinquent for a period of five (5) years or more for county, state, or other purposes, and where the total amount of delinquent taxes and assessments upon any real estate shall exceed the value of said property," the land might be sold for less than the amount of the taxes due thereon, the application of section 194 would, of course, be the same as when the provision is expressed, as now, in a separate act. It is thought that the language of the notice prescribed in section 194 is not sufficient to indicate that the sale will take place in pursuance of all of the provisions of the statute

in force. I do not see why the words, "that so much of each tract of land or town lot described in said list as may be necessary for that purpose," should be thought to indicate that the land would not be sold for less than the whole amount of the taxes charged against it. The property owner is notified that all of the land will be sold if it is necessary in order to pay the taxes delinquent thereon, but there is no statement in the prescribed notice, directly or by implication, that the land will not be sold unless it brings enough to pay all of the taxes charged against it. I am unable to understand the reasoning of the majority opinion upon this point. No doubt, if the land were sold for its full value, such sale would not be a violation of the provision of the constitution in question. All tax liens upon which it was sold would be merged in the title of the purchaser. Chapter 76 does not require the land to be sold for its market value, and makes no provision to that end. Notwithstanding that fact, it allows the owner to redeem from the taxes by paying the amount for which the land sold. This is forbidden by the constitution.

THOMAS DENNISON v. GEORGE M. CHRISTIAN.*

FILED DECEMBER 7, 1904. No. 13,883.

1. **Extradition.** Section 364 of the criminal code does not authorize the extradition of a person charged with crime against the laws of another state without proof that the person so charged is a fugitive from the justice of the demanding state.

2. **Warrant.** It is not necessary that the warrant issued by the governor of this state upon the requisition of the governor of another state should contain the express statement that the governor has found that the accused is a fugitive from justice. The fact of the issuing of the warrant, upon demand made upon that ground, is sufficient to justify the presumption that the governor so found, until that presumption is overthrown by proof to the contrary.

* See *Dennison v. Christian*, 196 U. S. 637. *Judgment affirmed.*

3. **Habeas Corpus**: RETURN. Upon proceedings in habeas corpus to obtain the discharge of one who is held under the governor's warrant in extradition, it is not indispensable that the officer's return to the writ contain direct affirmative allegations of all of the facts upon which the extradition proceedings are based. If the return sets forth the governor's warrant under which the accused is held, and the recitals of the warrant together with the allegations of the application for habeas corpus show facts sufficient to justify the detention of the accused, the return is sufficient.

4. **Requisition**: GOVERNOR'S FINDINGS: QUESTIONS OF LAW. When such requisition is made upon the governor of this state he must determine: First, whether the person demanded is substantially charged with a crime against the laws of the state from whose justice it is alleged he has fled by an indictment or affidavit properly certified; and, second, is he a fugitive from justice from the state demanding him? When it is made substantially to appear to the court in habeas corpus proceedings upon what showing the governor acted, it becomes a question of law for the court to determine whether or not the accused has been substantially charged with a crime against the demanding state.

5. **Review**: EVIDENCE. In determining whether the evidence before the court below was sufficient to support the judgment, this court will not regard errors of the trial court in admitting incompetent evidence if it appear from the whole record that, upon the evidence conceded to be competent, no other conclusion could be reached than the one reached by the trial court.

6. ———: CONSTRUCTION. This court is bound by the construction of the extradition laws adopted by the supreme court of the United States. In view of the language of that court in *Hyatt v. Corkran*, 188 U. S. 691, the courts of this state will not review the decision of the governor in extradition proceedings upon a question of fact made before him, which the law makes it his duty to decide and upon which there was evidence *pro* and *con* before the governor.

7. **Cross-Examination**: ERROR WITHOUT PREJUDICE. When the relator in habeas corpus proceedings gives evidence in his own behalf, the court should not allow him to be cross-examined upon matters not related to his examination in chief, but an error in so doing is without prejudice to the defendant, the trial being to the court itself, when no other judgment than the one entered could have been rendered upon the evidence which is conceded to be proper and competent.

ERROR to the district court for Douglas county: GEORGE A. DAY, ALEXANDER C. TROUP and WILLIAM A. REDICK, JUDGES. *Affirmed.*

W. J. Connell, Smyth & Smith, Cochran & Egan and *Thomas C. Munger,* for plaintiff in error.

H. C. Brome, E. E. Thomas and *L. W. Fallon, contra.*

SEDGWICK, J.

In April, 1904, the relator, Thomas Dennison, was, by an indictment of the grand jury of Harrison county, Iowa, charged with the crime of receiving and aiding in the concealing of stolen property knowing the same to be stolen. The crime was alleged to have been committed in November, 1892, in Harrison county, Iowa. Upon this indictment, a requisition was issued by the governor of Iowa upon the governor of this state, upon which a warrant was issued by the governor of this state for the arrest of the relator as a fugitive from justice, and for his return to the state of Iowa for trial. He made application to the district court for Douglas county for a writ of habeas corpus, and upon the hearing of that application he was remanded to the custody of the officers under the governor's warrant. He prosecutes these proceedings in error to this court to review that decision. The record shows that the relator was at the time of the alleged offense a resident of the city of Omaha, in this state, and that he has since that time openly and notoriously continued his residence there. The right of the officers and of the special agent of the state of Iowa, designated by the governor's warrant for that purpose, to restrain the relator of his liberty under the governor's warrant was resisted upon various grounds; and, among others, it was insisted by the relator that he was not in the state of Iowa at the time of the alleged commission of the offense, and was therefore not a fugitive from the justice of the state of

Iowa. Various questions arising out of this contention are discussed in the briefs and will be hereinafter noticed. An indictment having been found about 12 years after the alleged commission of the offense, if the crime had been committed in this state, the prosecution would be barred under our statute of limitations; and if the defendant had resided during this time in the state of Iowa, it would likewise be barred under their statutes. The manifest cause of the delay in the prosecution was the failure to discover sufficient evidence against the defendant to warrant it. The defendant's whereabouts during this time being a matter of public notoriety, if this evidence had been sooner discovered, the proceedings for extradition might have been as readily pursued at an earlier date as at the present time. Nothing was done by the relator in the meantime which could have hindered such extradition. Statutes of limitations ordinarily prevent the prosecution of crimes after so long a period of time has elapsed as to render it probable that evidence that might vindicate the accused would be lost or otherwise become unavailable. A statute of limitations which provided that proceedings for the extradition of persons charged with crime should, under circumstances like these, be subject to the same limitations prescribed for criminal proceedings in ordinary cases would perhaps not be unreasonable. Under such a statute the authorities of Iowa would have had the full term prescribed by the statute in which to have begun these proceedings against this relator. His place of residence having been notorious, and no concealment having been attempted, there seems to have been no reason for delay in taking these proceedings that would not have been of equal force if the defendant had resided in the state of Iowa, which might have been but a few rods from his actual residence. It is true that, if a person commits a crime and withdraws himself from the state where he has committed it, without any thought of fleeing from justice, but for the purpose of going to his own home, he is still, within the extradition laws, a fugitive from justice

of the state in which he has committed the crime. This has been frequently determined. It is not contended by relator that the statutes of limitations of the respective states apply to extradition proceedings, nor that one who has become a fugitive from justice may, by lapse of time, under any circumstances, cease to be so regarded; but the foregoing considerations tend to emphasize the necessity of guarding the accused against an unwarranted deportation from the state of his residence.

1. In support of the judgment of the court below it is urged that, in this state, it is not necessary to show that the accused is a fugitive from justice in order to justify his extradition. It is said that our statute provides that one who is charged with having committed a crime in another state may be sent to such state for trial; that the federal legislation upon the subject of extradition is not exclusive, and hence such legislation on the part of our state is valid. There is a dictum of Judge Story's to the effect that the legislation of congress supersedes and prohibits all state legislation upon this subject. *Prigg v. Pennsylvania,* 16 Pet. (U. S.) *539, *617. But the validity of such state legislation, ancillary to and in aid of the act of congress, is now established. See *Ex parte Ammons,* 34 Ohio St. 518; *Ex parte White,* 49 Cal. 433; *Ex parte Romanes,* 1 Utah, 23. And such provisions are now found in the laws of many of the states in the Union. The power to arrest and surrender a fugitive from justice, is not dependent upon the constitution, since it existed prior to the adoption of that instrument; it was recognized among the states under the confederation, and, even before the confederation, among the colonies. *Commonwealth of Kentucky v. Dennison,* 24 How. (U. S.) 66, 16 L. ed. 717, 727. It seems to be reasonable to suppose that the state legislatures have power to authorize extradition between the states independently of the provisions of congress upon that subject.

This case was heard below before three judges of the district court sitting together. It appears that they were

not agreed upon the question of the power of the state legislatures, but it would seem that they were agreed in the view that the statute relied upon does not authorize extradition unless the accused is a fugitive from justice. We find in the record an opinion of Judge Redick, who was one of the judges who heard the case below, in which he concludes that the relator could not be held unless he is shown to be a fugitive from justice, and in this part of his opinion the other judges appear to concur. He says:

"Section 364 contains a proviso at the end of the section. The first part of the section provides that no person shall be removed from the state of Nebraska to any other state, a prisoner, for any crime committed within the state of Nebraska. It then provides certain penalties against any persons who are interested and take part in any such removal; Provided, however, that any person who has committed any crime in any other state, where he ought to be tried for that crime, may be sent to that other state, and it is that proviso which it is claimed warrants the extradition, regardless of the question of whether or not he is a fugitive from justice.

"This section 364 contains in the first part an exception, 'Except in cases specially provided for,' that is, no removal shall be had except in cases specially provided for by statute. It first came upon the statute books of this state by an act passed in 1858, approved November 4, and was section 9 of that act, and the exception which I have just read doubtless had reference to cases provided for by another law in existence at that time, and not now upon the statute books, providing that the governor of the state might enter into contracts with the governors of other states for the care of prisoners sentenced by the courts of this state for crimes committed in this state, because at that time there was no adequate provision in this state for taking care of such prisoners, and the exception which I have just read doubtless had reference to that special provision of the law.

"Section 333, which is declaratory of the law of the

United States, authorizes the governor to extradite an accused when he has committed a crime, or stands charged with the commission of a crime in any other state and is a fugitive from justice of that state, because the provision is that, in cases provided for by the constitution and laws of the United States, the governor shall issue his warrant when it is made to appear that the defendant stands charged, etc. Under that section it must appear that the defendant was a fugitive from justice, otherwise the governor has no power to issue his warrant. That section I have been unable to find prior to the Revised Statutes of 1866 No doubt it was passed prior to that time; but it was not in the criminal code of 1858 so-called, or the collation of the criminal laws in 1858, and doubtless was a subsequent enactment to section 364. Believing that to be true, it probably was intended by this proviso to except or exclude from the prior provisions of that section cases of extradition. * * * No provision in this state with reference to extradition appears prior to this section 364. * * * These two laws were incorporated into the revision of 1866, and also that of 1873, and have been continued in the statute books from that time down to the present, and they are two provisions apparently referring to the same subject. In that case it is the duty of the court to harmonize them if possible.

"Under section 364, when originally enacted, and until the enactment of section 333, there was no method provided by the state for the enforcement of that act—no power granted by the state to the governor to issue his warrant in such cases. The power was given and the duty imposed, however, by the United States statute. * * * While the existence of these two sections is something of an anomaly in a statute, by construing them together under the ordinary rules in the construction of statutes so that it may be possible that both may stand, we conclude that section 333 is the only one which grants power from the state to the executive to issue his warrant for extradition, and that the effect of that section is to re-

strict his power to such cases as are provided for by the constitution and laws of the United States."

The language of the proviso of section 364 of the criminal code, which is referred to, is:

"*Provided*, That if any citizen of this state, or any person or persons at any time resident in the same, shall have committed, or shall be charged with having committed, any treason, felony, or misdemeanor, in any other part of the United States or territories where he or she ought to be tried for such offense, he, she, or they may be sent to the state or territory having jurisdiction of the offense."

For the reasons stated by the learned district court, we think that this proviso ought not to be construed to provide for extradition in cases not contemplated by the federal statute; but its purpose is rather to so limit the application of section 364 as not to interfere with the legislation of congress on the subject of extradition. No extradition therefore can be allowed unless it appears that the accused is a fugitive from justice.

2. The first contention in relator's brief is that "the warrant and return are insufficient on their face." One ground of this objection seems to be that it does not sufficiently appear upon the face of the papers that the accused is a fugitive from justice. There is annexed to the requisition an affidavit of the prosecuting attorney of Harrison county, Iowa, in which affiant says: "That Tom Dennison, who is charged with the crime of receiving and aiding in the concealing of stolen property committed on or about November 8, 1892, in the county of Harrison, has, since the commission of said crime, actually fled from the state of Iowa, the time of his escape being about November 8, 1892, and that he is now a fugitive from the justice of this state, and I have reason to believe is at Omaha in the state of Nebraska." This was held to be sufficient in *Ex parte Sheldon*, 34 Ohio St. 319, 327. And in *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, it is said:

"It is conceded that the determination of the fact (that the accused is a fugitive from justice) by the executive of

the state in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof."

It is not necessary that the writ contain an express recital that the governor found that the accused was a fugitive from justice. The fact of the issuing of the warrant, upon demand made upon that ground, is sufficient to justify the presumption that the governor so found, until that presumption is overthrown by proof to the contrary.

3. The foregoing considerations seem also to answer the objection that the return of the respondent is insufficient. This objection seems to be predicated upon the idea that the return to the writ of habeas corpus must contain direct traversable allegations of all the facts upon which the extradition proceedings are based. It is said in the brief:

"There is no allegation, statement or suggestion that Governor Cummins or anybody else presented to the governor of this state any proof whatever that Dennison had fled from the justice of the state of Iowa; no allegation or statement that Dennison was a fugitive—simply that the governor demanded him as a fugitive; no statement or allegation that he was charged with crime in the demanding state, but simply a statement that he was demanded by the governor as one charged with crime; no statement, averment or suggestion that the demanding governor produced or caused to be produced to the governor of this state a copy of an indictment found, or affidavit made, before a magistrate, charging Dennison with having committed a crime; no statement, averment or suggestion that the executive of Iowa produced or caused to be produced a copy of an indictment found, or affidavit made, before a magistrate, charging Dennison with having committed a crime, either certified or otherwise."

Some of the things above suggested are shown in the application itself for the writ of habeas corpus. Others

are recited in the return and in the warrant of the governor which accompanies it. There was annexed to the application for the writ of habeas corpus a copy of the indictment and of the affidavit of the county attorney of Harrison county, Iowa, alleging that the accused is a fugitive from justice. The return to the writ alleged the finding of the indictment by the grand jury of Harrison county, and that thereafter application in due form was made to the governor of the state of Iowa for a requisition upon the governor of the state of Nebraska, upon a showing that said Dennison, after the commission of said crime and upon the 8th day of November, 1892, actually fled from the state of Iowa, and was at the city of Omaha in the state of Nebraska. It was also alleged that the governor of Iowa issued his requisition in due form, and that thereafter the requisition so issued by the governor of the state of Iowa was duly presented to and honored by the governor of the state of Nebraska, and that thereupon the governor of the state of Nebraska issued and delivered to respondent his warrant for the extradition of said Dennison to the state of Iowa. A copy of the warrant is set out in the return, and the recitals thereof are: "Whereas, Albert B. Cummins, governor of the state of Iowa, has demanded of the governor of this state Tom Dennison, charged with the crime of reciving and aiding in the concealing of stolen property, as a fugitive from justice from said state of Iowa, and complied with the requisites in that case made and provided." In *Roberts v. Reilly, supra,* it is held that a decision of the governor as expressed in the warrant "is sufficient to justify the removal (of the accused) until the presumption in its favor is overthrown by contrary proof." In *Hyatt v. Corkran,* 188 U. S. 691, 23 Sup. Ct. Rep. 456, the return to the writ of habeas corpus "was to the effect that the relator was held by virtue of a warrant of the governor of New York, and a copy of it was annexed. * * * No other paper was returned by the chief of police bearing upon his right to detain the relator." The issue was made by the filing of

an affidavit on the part of the relator which traversed this return, and which set up the facts relied upon to show that the extradition of the relator was unwarranted. Authorities cited by relator upon the general rules of code pleading are not applicable. It would seem that the finding by the governor that accused is a fugitive from justice, which finding is sufficiently declared by issuing his warrant, is conclusive, at least so far as to place the burden upon the accused to make it appear that he is not a fugitive from justice. The decisions of the supreme court of the United States upon the subject of extradition between states are binding upon all persons and upon all courts, and there can be no doubt that, under the decisions of that court above referred to, the return to this application was *prima facie* sufficient.

4. Is the judgment of the district court supported by the evidence?

"When a demand of this character is made on the governor of a state, two questions are presented to him: First, is the person demanded substantially charged with a crime against the laws of the state from whose justice it is alleged that he has fled, by an indictment or affidavit properly certified? Second, is he a fugitive from justice from the state demanding him?" *Bruce v. Rayner,* 124 Fed. 481.

When the accused is in custody under the governor's warrant, it is necessary for him, in order to obtain his discharge by the courts upon a writ of habeas corpus, to make it appear, either that he is not "substantially charged with a crime against laws of the state from whose justice it is alleged that he has fled, by an indictment or affidavit properly certified," or that he is not a fugitive from justice from the state demanding him. When it is made properly to appear to the court upon what showing the governor acted, it becomes a question of law for the court to determine whether or not the accused has been substantially charged with a crime against the laws of the demanding state. If the governor's warrant upon which

he is held recites the proceedings had before the governor, from which it appears that the accused was so substantially charged, it would seem from the cases above cited that the presumption is that the proceedings before the governor were regular in that regard. If the original papers described in the recitals of the governor's warrant are before the court, the evidence so furnished will, no doubt, control the recitals of the warrant. If the recitals of the warrant are not sufficient, and the relator in his application for the writ sets out the original papers that were considered by the governor, there can, of course, be no doubt that the court before which the proceedings are pending will consider those original papers in determining whether the relator was charged with a crime against the laws of the demanding state, and whether the requirements of the federal statute in that regard have been met. In this case, it appears from the application for the writ itself that an indictment had been regularly found in the district court for Harrison county, Iowa, charging the relator with the crime for which he is held, and that, pursuant thereto, a request had been made by the authorities of Harrison county of the governor of the state of Iowa for his requisition upon the governor of this state, and that accompanying that request there was evidence that the accused had fled from the state of Iowa and was then in this state. It appears from the recitals of the governor's warrant that a requisition was made upon the governor of this state for the arrest and return of the relator upon the charge which was contained in the indictment, and it is also recited in the warrant that the governor of the state of Iowa in so doing "complied with the requisites in that case made and provided." It is alleged in the return to the writ: "Said requisition so as aforesaid issued by the said governor of the state of Iowa was duly presented to and honored by his excellency, John H. Mickey, governor of the state of Nebraska, and thereupon the governor of the state of Nebraska issued and delivered to respondent his warrant for the extradition

of said Dennison to the state of Iowa." The evidence of the relator fails to show that these papers were not before the governor of this state when his warrant was issued. On the other hand, the evidence in the record clearly shows that all of these papers and proceedings were duly considered by the governor. The relator then failed to make it appear upon the hearing of his application for the writ of habeas corpus that he had not been substantially charged with a crime against the laws of the state demanding him, or that this fact did not sufficiently appear before the governor of this state when he acted upon the requisition. The evidence is therefore sufficient to support the judgment of the district court, unless the relator has made it appear that he was not a fugitive from justice from the state demanding him.

5. Upon the hearing in the district court a large volume of evidence was taken, principally upon the question whether the accused was a fugitive from justice. Some of this evidence was received against the objection of the relator that it was incompetent to show that the relator was in Iowa at the time of the alleged offense, which was one of the principal questions of fact controverted. An exhibit was offered in evidence which it was claimed was the hotel register of the Kimball House of Davenport, Iowa. Objection was made that no sufficient foundation was laid for its introduction. The objection was overruled, and the evidence received. It is strenuously insisted that the court erred in this ruling. It has been frequently said by this court that the trial court will be presumed to have based its decision on such competent evidence as is introduced before it. And the judgment of the trial court, in matters tried to the court itself, will not be reversed because of errors in receiving incompetent or immaterial evidence, the presumption being that such evidence was disregarded. In this case, however, it appears from a consideration of the whole record that the evidence complained of was not disregarded by the court. Some of the judges who heard the matter appear to have

predicated their judgment, at least in part, upon this evidence. It is plausibly urged that in such case the incompetent evidence must be held to have prejudiced the relator. But this cannot be so if, upon consideration of the competent evidence only, any other decision than the one rendered must have been erroneous. In the following discussion of the sufficiency of the evidence the reasons will be given for the conclusion that no other decision could have been supported upon the evidence which is conceded to be competent.

6. In *Hyatt v. Corkran*, 188 U. S. 691, it was said:

"It must appear to the governor, before he can lawfully comply with the demand for extradition, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, etc., and that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand. * * * The question whether the person demanded was substantially charged with a crime or not was a question of law and open upon the face of the papers to judicial inquiry upon application for a discharge under the writ of habeas corpus; the question whether the person demanded was a fugitive from the justice of the state was a question of fact which the governor upon whom the demand was made must decide upon such evidence as he might deem satisfactory."

Prior to that decision there had been much controversy and some conflicting decisions in the courts of the several states as to whether the decision of the governor that the accused was a fugitive from justice might be reviewed judicially in proceedings in habeas corpus. In some cases the decision of the governor was thought to be conclusive upon the courts, and in others it seems to have been considered as open to investigation as an original question. In *Hyatt v. Corkran*, *supra*, it was shown by stipulations upon the record itself that the accused was not in the demanding state at the time of the alleged commission of

the crime charged, and it was held in that case that, when the facts from which it must follow that the accused is not a fugitive from justice "are proved so that there is no dispute in regard to them," the accused must be discharged. In the opinion this language is used:

"If upon a question of fact, made before the governor, which he ought to decide, there were evidence *pro* and *con*, the courts might not be justified in reviewing the decision of the governor upon such question. In a case like that, where there was some evidence sustaining the finding, the courts might regard the decision of the governor as conclusive."

In *Bruce v. Rayner*, 124 Fed. 481, it was said by the circuit court of appeals of the fourth circuit:

"If conflicting evidence has been submitted to the governor of the state in which the person is found upon the question of fact, and he, considering it, had decided to deliver the person demanded, the presumption being always in favor of the governor's decision, the courts will not inquire into and reverse his decision."

And to support this proposition the above language from *Hyatt v. Corkran, supra*, was quoted by the court. These are the latest expressions of the federal court upon this question that have been brought to our attention. There can be no doubt that this record shows that the question whether the accused was a fugitive from justice was before the governor; that there was sufficient evidence before him to make it appear, at least *prima facie*, that the accused was a fugitive from justice. Under the rule established by the federal courts in the above cases, this was sufficient to justify the remanding of the relator, unless it appeared from the record itself that he was not a fugitive from justice, or was made to appear by such clear and invincible proof that it can be said from the whole evidence that there was no dispute before the governor in regard to the fact. If the facts from which it is to be determined whether the accused is a fugitive from justice are established by the record, or if they are so established by proof

that it may be fairly said that there is no dispute in regard to them, then the question would become a question of law to be determined by the court upon the habeas corpus proceedings, but, if it appear that there was evidence before the governor that was substantially conflicting in regard to the facts upon which this question is to be determined, the responsibility of determining the question rests with the governor.

The relator undertook to prove that he was not in the state of Iowa at the alleged time of the offense charged against him. There is no doubt of the competency of this proof, nor that, if this fact was conclusively shown upon the record, or was so proved that it could be said that there was no substantial dispute in regard to it, it would require the discharge of the accused. To establish this proposition, the relator himself testified that he was in Omaha, Nebraska, from the end of October, 1892, down to the first of January, 1893; that on the night of November 4 he stayed at the Arcade hotel, in Omaha, and that he was not at any time during the period from that time to the first of January following in the state of Iowa. He produced several witnesses who corroborated him in these statements. Although the occurrence was some 12 years before this hearing, these witnesses testified that their attention had been particularly called to the facts at the time, and their testimony was positive that he was not out of the city of Omaha during that time. There are circumstances tending, at least in some degree, to discredit this testimony, and even though there were not, the statements of these witnesses are contradicted by other evidence; and without going into a detailed statement of the evidence that was adduced upon this point, it is sufficient to say that the testimony of these witnesses is not of such a character, in view of the other evidence in the record, as to enable us to say that the matter was established beyond dispute. It seems clear therefore that the evidence upon the hearing in the district court, which is conceded to be competent, shows that all questions of fact necessary

to a determination of the matter were fairly controverted before the governor. That being the case, the rule now established by the federal courts precludes the courts from reviewing those questions upon habeas corpus proceedings. The great delay in beginning the proceedings for extradition, and all facts bearing upon the question whether the accused is a fugitive from justice, would be duly considered by the governor.

Objection was made to the cross-examination of the relator, and it seems that upon this cross-examination matters were inquired into that had no relevancy to the questions being investigated; but, from the view that we take of the effect of the competent evidence in this case, and considering that the evidence was to be weighed by the court itself, we cannot see that any prejudicial error against the relator was committed.

The judgment of the district court was the only one possible upon the evidence before it, and is

AFFIRMED.

FRED ESCH V. LIZZIE GRAUE.

FILED DECEMBER 7, 1904. No. 13,682.

1. **Bastardy: TRIAL.** It is not error for the court, on the trial of a bastardy case, to refuse to order or cause to be removed from the court room a child less than five months old, brought by the prosecutrix with her to the witness stand, where such child was not exhibited to the jury, and no comparison was made between it and the alleged father.

2. **Testimony of Prosecutrix.** In such a case, the testimony of the prosecutrix that she was the mother of a bastard child; that it was born on a certain date; that it is a girl, and the accused is its father, together with the fact that she brought a child with her to the witness stand, is sufficient to warrant the inference that such child was born alive, and was living at the time of the trial.

3. **Evidence** examined, and *held* sufficient to sustain the verdict.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

Rose & Comstock, for plaintiff in error.

Billingsley & Greene and *R. H. Hagelin, contra.*

BARNES, J.

Fred Esch, hereinafter called the plaintiff, prosecutes error from a judgment of the district court for Lancaster county, by which he was found to be the father of the bastard child of Lizzie Graue, and was adjudged to pay $100 a year for 10 years, and the sum of $50 a year for 4 years thereafter for its support, together with the costs of the prosecution.

1. It is contended by the plaintiff that the court erred in allowing the child in question to remain in the court room during the trial. It appears that the prosecutrix came into court with the child, which was less than 5 months old, in her arms; that nothing was said about the matter until the close of the plaintiff's evidence, and at a time when the cries of the child disturbed the counsel in his examination of one of the witnesses. He then objected to its presence, and a controversy between counsel arose over the matter. It does not appear that the child was exhibited to the jury, or that the attention of that body was in any way called to it, except as above stated. The jury made no comparison to ascertain whether there was any resemblance between the child and its putative father. It does appear, however, that one of the attorneys for the prosecution made a remark calculated to convey the impression that the child looked like the plaintiff in error, but the remark being excepted to the court said: "The exception is well taken. The child has not been introduced in evidence, and its appearance is not to be considered by the jury, and you should not consider the statement made by counsel." This left the plaintiff

no cause of complaint, so far as that matter was concerned.

As the record stands, we are called upon to determine whether the mere presence of the illegitimate child in the court room, and the fact that it was in sight of the jury, calls for a reversal of the judgment. In other words, did the court err in refusing to order the child removed from the court room. In the case of *Hanawalt v. State,* 64 Wis. 84, the court said:

"In bastardy proceedings the bastard child may not be exhibited to the jury for the purpose of showing by its likeness to the defendant that it is his child."

This rule seems to have been approved by us in *Ingram v. State,* 24 Neb. 33. In fact it is believed that the great weight of authority now holds that a child less than 2 years of age may not be exhibited to the jury for the purpose of showing its likeness to the defendant in a bastardy proceeding. It will be observed that in this case no such exhibition was in fact had, and it appears that the court made a finding to that effect on the hearing of the motion for a new trial, where that question was presented. So we hold that the case of *Hutchinson v. State,* 19 Neb. 262, states the correct rule. In that case it was held not error for the trial court to refuse to order or cause to be removed a seven months' old child brought by the prosecutrix to the witness stand, there being no reference made to it during the trial or argument, and no comparison being made between it and the alleged father. This disposes of plaintiff's first ground of error.

2. It is further contended that the evidence in this case is not sufficient to sustain the verdict or finding that the plaintiff herein was the putative father of the child in question; and the particular ground of this contention is that no evidence was introduced to show that the child was born alive, or was living at the time of the trial. It seems somewhat singular that this question should be urged and presented after the strenuous argument of the plaintiff's counsel that the child should have been ex-

cluded from the court room, and should not have been permitted to be in a place where it might be even seen by the jury. But we are disposed to give this contention our serious consideration. The prosecutrix testified on that question as follows:

Q. Are you the mother of the child that has been born?
A. Yes, sir.
Q. When was the child born?
A. 27th of July.
Q. Of this year?
A. Yes.
Q. Is it a girl or a boy?
A. It is a girl.
Q. Who is the father of that child?
A. Fred Esch.

This testimony considered with the fact that the prosecutrix appeared in court with the child in her arms, and no question was raised as to whether or not it was alive, when born, and living at the time of the trial, until after the verdict was rendered, would seem to be sufficient to sustain said verdict. Again, in *Priel v. Adams,* 3 Neb. (Unof.) 305, we announced the following rule: "In a prosecution for bastardy when it is proven that a child was born upon a certain day it may be inferred that it was born alive." This seems to conclusively settle the question.

No other errors are assigned or argued in the brief of the plaintiff, and, as the evidence on all other questions is sufficient to sustain the verdict, it follows that the judgment of the trial court was right, and should be affirmed.

For the reasons above stated, the judgment of the district court is

AFFIRMED.

H. J. MAYS v. STATE OF NEBRASKA.

FILED DECEMBER 7, 1904. No. 13,683.

1. **Forgery**: EVIDENCE. Where, on the trial of a person accused of uttering a forged check, the prosecuting witness positively identified the defendant as the one who gave him the check, and his evidence was corroborated by another witness who was present when the check was cashed, and by the facts and circumstances surrounding the transaction, it cannot be said that such identification was not sufficient to sustain a conviction.

2. **Alibi**: PROOF. A defendant, to establish an *alibi* must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place.

3. **Hearsay Evidence.** The testimony of a witness that a third person had stated to him that he was guilty of the crime of which the defendant was accused is hearsay evidence, and therefore not admissible.

4. ———: WRITTEN STATEMENT. An ordinary written statement of such third person that he committed the crime in question, which is not sworn to, and is not preserved in the form of a deposition, is not competent evidence, and should not be received as a defense to the prosecution.

5. **Instruction**: REASONABLE DOUBT. We decline to approve of the instruction given in this case defining a reasonable doubt as set forth in the opinion herein, but in view of our former decisions we cannot reverse the judgment herein for the giving of that instruction. *Lillie v. State, ante*, p. 228, followed.

ERROR to the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

William Gaslin and *Frank E. Beeman*, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, contra.*

BARNES, J.

The state prosecuted one H. J. Mays, in the district court for Buffalo county, on an information containing two counts. The first count charged him with forging a certain check purporting to be signed by one Martin Bleck, on the City National Bank of Kearney, Nebraska, for the sum of $57; and the second count charged him with uttering and passing said forged check, knowing the same to have been forged. The trial resulted in a verdict of not guilty on the first count, and guilty as charged in the second count. After overruling defendant's motion for a new trial, the court sentenced him to be confined in the state penitentiary for a period of three years, and pay a fine of $100, together with the costs of the prosecution. From that judgment he prosecutes error.

1. The accused contends that the evidence is not sufficient to sustain the verdict, because of an alleged failure to identify him as the person who passed the check on the prosecuting witness. He also claims that the evidence establishes an *alibi;* and these assignments of error will be considered together. An examination of the evidence contained in the bill of exceptions discloses that the prosecuting witness, Switz, positively identified the accused at the jail, the next day after he was arrested, as the man for whom he cashed the check; that he again identified him as positively at the trial, and gave such a circumstantial account of the transaction by which he took the check from the accused in payment of a small purchase of goods, and paid him the difference of $38 in cash, as to leave no reasonable doubt that the accused was the person who uttered the check. Again, the witness Johnson, who was present at the time the check was cashed, positively identified the accused as the person who passed it on the complaining witness. In addition to the testimony of these witnesses, other corroborating facts and circumstances were shown, so we are of the opinion that the

identification of the accused as the person who uttered the check in question was complete.

We have carefully examined the evidence to ascertain what it shows on the question of the *alibi* contended for by counsel, and we are unable to sustain that contention. No witness fixes the whereabouts of the accused at any particular place, at any exact point of time; no one pretends to definitely fix the time of the events detailed by his evidence, and it appears that, after the accused was first seen on the evening the check was uttered, there was plenty of time, before he was arrested, for him to have visited all of the places where he was seen, or where he claims to have been on that occasion. The rule is that "A defendant, to establish an *alibi*, must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place." *Klein v. People*, 113 Ill. 596. So we are constrained to hold that the evidence was amply sufficient to sustain the verdict.

2. Counsel for the accused further contend that the court erred in excluding the evidence of an alleged confession of one Harry Wilson, who seems to have been acting with the defendant in the transactions leading up to the commission of the crime of which he was convicted. It appears that Wilson had broken jail, and was then, and still is, at large, a fugitive from justice. He told the defendant's counsel and another that he was the one who uttered the check; and left a written statement to that effect when he made his escape. At the trial counsel offered to prove Wilson's statement by his own evidence, which offer was excluded. No authority need be cited to show that this evidence was hearsay, pure and simple, and was properly excluded for that reason, if for no other.

As to the written statement, it was not sworn to, was not preserved in the form of a deposition, nor did it

possess any of the elements which would render it competent evidence for any purpose whatever, and the court did not err in excluding it.

3. Error is also assigned for the giving of paragraph No. 13, of the court's instructions, as follows:

"A reasonable doubt, as used in these instructions, to justify an acquittal must be a reasonable one arising from a candid and impartial investigation of all the evidence in the case. A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and the jury is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to a possible state of facts differing from those established by the evidence. You are not at liberty to disbelieve as jurors, if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. If, after a careful and impartial examination and consideration of all the evidence in the case, you can say that you feel an abiding conviction of the guilt of the defendant, and are fully satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond a reasonable doubt."

The principles enunciated in this instruction have been approved by us. See *Willis v. State,* 43 Neb. 102. About two years after the opinion in that case was filed, Commissioner IRVINE, in *Barney v. State,* 49 Neb. 515, in discussing this instruction said:

"Whenever a court undertakes to define a reasonable doubt, it opens the way to a vast amount of speculative reasoning without any very practical application. As said by Judge Thompson, in his work on Trials: 'All the definitions are little more than metaphysical paraphrases of an expression invented by the common law judges, for the very reason that it was capable of being understood and applied by plain men in the jury box.' (2 Thompson, Trials, sec. 2463.) The writer very much doubts whether

any confusion has ever existed in the mind of a juryman in regard to the meaning of the term, except where that confusion has arisen from such attempts to define the term."

So it appears that by our later holdings we have disapproved of this form of instruction, but have declined to reverse a case simply because it was given to the jury. Again, it was said in *Lillie v. State, ante,* p. 228, after quoting from the language of Mr. Commissioner IRVINE, above quoted:

"The instruction may be deserving of some of the criticism it has provoked, but in view of the former decision of this court, we cannot reverse this judgment solely on account of the giving of this instruction."

So, while we do not approve of the instruction, we feel bound by the doctrine announced in our later decisions, and we cannot reverse the judgment in this case solely on the ground of giving this instruction.

A careful examination of the bill of exceptions satisfies us that no error was committed by the trial court in the admission or exclusion of evidence. The record discloses no reversible error, and the judgment of the district court is therefore

AFFIRMED.

EDWARD M. CUTHBERTSON V. STATE OF NEBRASKA.

FILED DECEMBER 7, 1904. No. 13,813.

1. **Desertion of Wife: INFORMATION.** In order to charge the crime of wife desertion under the provisions of section 212*a* of the criminal code, the information must clearly state that both the abandonment and the defendant's neglect or refusal to maintain or provide for his wife were without good cause.

2. **Venue.** The prosecution for such crime must take place in the county where the parties resided at the time of their separation, and where the wife was still residing when the unlawful neglect or refusal of the husband to maintain and provide for her occurred, although the first act of separation took place while the parties were temporarily in another county.

3. **Evidence: REVIEW.** Where the evidence on the question of the neglect or refusal of the husband to maintain or provide for his wife is conflicting, this court should not pass on its sufficiency, but will leave that matter for the determination of the jury.

4. **Trial.** In such a case the prosecution should not be permitted to prove acts tending to show improper familiarity between the accused and a woman other than his wife, where such acts occurred before the alleged desertion took place, and appear to be in no way connected therewith.

ERROR to the district court for Douglas county: GEORGE A. DAY, JUDGE. *Reversed.*

Brome & Burnett and *A. G. Ellick,* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, contra.*

BARNES, J.

Edward M. Cuthbertson, hereinafter called the defendant, was convicted in the district court for Douglas county of the crime of wife desertion, under the provisions of section 212*a* of the criminal code, and was sentenced to imprisonment in the county jail for a period of six months, and required to pay the costs of the prosecution. From that judgment he brings error.

1. Defendant's first contention is that the trial court erred in overruling his objection to the introduction of any evidence and his motion in arrest of judgment, because the information does not charge a crime; or, in other words, it does not allege a violation of the provisions of the statute in question. The act, so far as it relates to the question involved in this case, reads as follows:

"That every person who shall, without good cause, abandon his wife and wilfully neglect or refuse to maintain or provide for her, * * * shall, upon conviction, be deemed guilty of a desertion and be punished by imprisonment in the penitentiary for not more than one year, or

by imprisonment in the county jail for not more than six (6) months."

It is apparent from reading the statute above quoted that abandonment alone, even without good cause, is not sufficient to constitute the crime of wife desertion. There must also be a wilful neglect or refusal to maintain or to provide for the wife, without good cause. The law is somewhat drastic, but it seems clear that the legislature never intended to make it a penal offense for a man to live separate and apart from his wife. Indeed, conditions sometimes arise where parties cannot well live together, and to continue the marital relation would be intolerable to one or perhaps both of them. While it requires the commission of both acts to constitute the crime, yet it is beyond question that the real purpose of the legislature in passing this statute was to make it a penal offense for a man, without good cause, to neglect or refuse to maintain or provide for his wife. To furnish maintenance for the wife is a legal duty which a husband owes to her, the performance of which should be made certain, unless by her own conduct she forfeits her right to demand it; and when such forfeiture occurs, the husband may be said to have good cause for his neglect or refusal to perform that duty. Again, there can be no conviction under the statute in question if it appears that by reason of physical injury or disability, such as destroys the earning capacity of the husband, together with his lack of property, money or estate, he is unable to support his wife. The existence of such a condition would amount to good cause, and constitute a complete defense to a prosecution on such a charge. So we are of the opinion that it was necessary to charge in the information that both the abandonment and the neglect or refusal of the defendant to maintain or provide for his wife were without good cause. The charging part of the information is as follows:

"That on the 18th day of September, in the year of our Lord one thousand nine hundred and three, Edward M. Cuthbertson, late of the county of Douglas aforesaid, in

the county of Douglas and state of Nebraska, aforesaid, then and there being, and then and there being the lawfully wedded husband of Mildred Cuthbertson, then and there unlawfully and without good cause did abandon his said wife, the said Mildred Cuthbertson, and did then and there wilfully, unlawfully and feloniously neglect and refuse to maintain or provide for her, the said Mildred Cuthbertson."

A fair construction of the language above quoted leads us to the conclusion that the words "without good cause" apply to the charge of abandonment only, and that the information fails to allege that the defendant's neglect and refusal to maintain or provide for his wife was without good cause. The sufficiency of this charge was questioned at every stage of the proceeding, and we should not under such circumstances give the language a strained construction in order to hold it sufficient. It will be observed that the prosecutor in attempting to charge the offense has not followed the language of the statute. It is a well settled rule that an indictment for a statutory crime must follow, in substance, the language of the statute. 1 Bishop, Criminal Procedure (4th ed.), sec. 614. Judge MAXWELL in his work on Criminal Procedure (2d ed.), 145, speaking of indictments, says: "Let the pleader charge the offense in the words of the statute, and if the offense is made a felony by statute allege that the act was 'feloniously' done." Indeed, it is a fundamental rule that in charging a statutory offense it is always necessary, and generally sufficient, to charge it in the language of the statute or its equivalent. We are therefore of the opinion that the court erred in holding the information sufficient to charge a violation of the statute in question.

2. The defendant's second contention is that the prosecution took place in the wrong county; that the abandonment having occurred in Dawes county he could only be prosecuted in that county. An examination of the record discloses that the defendant and his wife were married in

Douglas county in 1901; that the city of Omaha, in that county, was their home or place of residence from that time until the early spring of 1903; when, for a short time, they kept a hotel at Humphrey, in Platte county, Nebraska. The evidence does not show that they gained a residence in that county, but it appears therefrom that they sold out their hotel business and returned to Omaha in June, 1903; that defendant sought and found employment with the Chicago & Northwestern Railroad Company, which required his presence at Chadron, in Dawes county, and at other points in South Dakota and western Nebraska; that he left his wife at their place of residence in Omaha while he was so employed; that in August of that year he wrote to her to visit him at Chadron, and sent her a pass to that place with return transportation to Omaha; that she was with him in the Black Hills, at the Hot Springs, Chadron and other places, from the 18th day of August until the 18th day of September, at which time they were stopping at a hotel in Chadron. On that day a quarrel took place between them, and the defendant left for Holden, Missouri, where he obtained employment with Owen Brothers. Before he took his departure he paid his wife's bill at the hotel until the next day, furnished her with some money, and it was understood that she would at once return to their place of residence in Omaha. This she did, and the defendant was aware of that fact, for he afterwards wrote her several letters and, as he claims, sent her money to that address. As above stated, it requires not only an abandonment, but also a wilful neglect or refusal to maintain or provide for the wife, without good cause, to constitute the crime of wife desertion. The evidence is without conflict, that the defendant, on the 21st day of November, sent a check to his wife at Omaha, Nebraska, for one-half of the wages he had earned up to that time. She admits having received this check, but says that she never got it cashed, and lost it in some manner. This, however, was no fault of his, and his neglect or refusal to maintain and provide for

her occurred, if at all, after that date. She was at that time living at their former place of residence in Douglas county, and the crime was committed, if at all, in that county. *State v. Weber*, 48 Mo. App. 500; *State v. Satchwell*, 68 Mo. App. 39. It is quite immaterial where the first act of separation occurs, if such act is followed by a wilful refusal to support at the place previously provided by the husband and considered by them as their home. The county in which the home is fixes the venue of the offense. Under the facts in this case a prosecution could not have been maintained in Dawes county, and the defendant's contention on this point cannot be sustained.

3. It is next contended that the evidence does not warrant a conviction on the merits. The defendant admits that he abandoned his wife on the 18th day of September, 1903, at Chadron, in Dawes county, Nebraska; but he emphatically denies that he has neglected or refused to maintain or provide for her, and vigorously contested that question at the trial. It is shown that at least for a time thereafter he did maintain and provide for her. As to whether or not he refused and neglected to perform that duty after the 21st day of November, 1903, the evidence is conflicting. In such a case it is not the province of this court to pass on the sufficiency of the evidence. That matter must be left for the determination of the jury.

4. The defendant also assigns error in the admission of certain evidence on the part of the prosecution. The assignment is subdivided into several propositions, but one of which requires our consideration. It appears that the trial court, over proper objections, received the evidence of one Clara Lyon, which tended to prove acts of improper familiarity between the defendant and a dining-room girl at the hotel in Chadron, at a time prior to the date of the alleged abandonment, which seems to be in no way connected with that act, or with his subsequent neglect or refusal to maintain or provide for his wife. This evidence certainly did not establish or tend to establish the charge set forth in the information. It must have discredited the

defendant before the jury, and its admission was prejudicial error.

As to the other propositions, it is sufficient to say that, while the prosecution was required to prove a negative and thus establish want of good cause, yet, such proof is sufficient if the evidence shows that the husband has the ability to support the wife, and that she has not so conducted herself as to furnish good cause for his desertion. If any of the evidence excepted to was incompetent for that purpose, the court, in the event of another trial, will, without doubt, exclude it.

For the errors above mentioned, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

UNION PACIFIC RAILROAD COMPANY v. JOHN WESTLUND, ADMINISTRATOR.*

FILED DECEMBER 7, 1904. No. 13,203.

ERROR to the district court for Dawson county: HOMER M. SULLIVAN, JUDGE. *Reversed.*

John N. Baldwin and *Edson Rich,* for plaintiff in error.

Warrington & Stewart, George W. Thomas, H. M. Sinclair and *Roscoe Pound, contra.*

AMES, C.

The record in this case is substantially identical with that in *Union P. R. Co. v. Fickenscher, ante,* p. 187, and the opinion in that case is therefore decisive of this.

It is recommended that the judgment of the district court be reversed and the cause remanded for a new trial.

OLDHAM, C., concurs.

* Rehearing allowed. See opinion, p. 734, *post.*

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for a new trial.

REVERSED.

The following opinion on rehearing was filed December 7, 1906. *Judgment of reversal adhered to:*

SEDGWICK, C. J.

This action was brought in the district court for Dawson county to recover damages caused by a fire alleged to have originated in the carelessness of the defendant. The case was argued and submitted with the motion for rehearing in the case of *Union P. R. Co. v. Fickenscher, ante,* p. 187, and for the reasons stated in the opinion in that case, the judgment of the district court is reversed and the cause remanded.

REVERSED.

SAMUEL ECCLES V. UNITED STATES FIDELITY & GUARANTY COMPANY.

FILED DECEMBER 7, 1904. No. 13,646.

Sureties upon an official bond are liable for a statutory penalty incurred by their principal by taking illegal fees.

ERROR to the district court for Gage county: JOHN S. STULL, JUDGE. *Reversed.*

A. Hardy, for plaintiff in error.

Hazlett & Jack, contra.

AMES, C.

Defendant in error signed, as surety, the official bond of one W. H. Walker as a justice of the peace. This action was brought upon the bond against Walker and his surety

to recover the statutory penalty of $50 for an alleged receipt by the former of illegal fees in his official capacity. The defendants answered separately, and there was a trial and verdict for the plaintiff. Upon motion the court set aside the verdict and granted a new trial as to the surety, but denied a like motion by Walker. Afterwards the court sustained a motion by the surety to dismiss the action as to it, on the ground that the petition does not state facts sufficient to constitute a cause of action against it. From the judgment of dismissal the plaintiff prosecutes error.

It is not disputed that the defendant in error was lawfully obligated as surety upon the official bond of Walker, which it was doubtless capable of becoming by estoppel, if not otherwise; and the sole question properly presented for decision is whether a surety upon an official bond is liable for a statutory penalty incurred by his principal by taking illegal fees. We think the answer should be in the affirmative. It was so decided by this court in *Kane v. Union P. R. Co.,* 5 Neb. 105, and again in *Phœnix Ins. Co. v. McEvony,* 52 Neb. 566. We do not see how it can be held otherwise than that the justice committed the offense complained of by virtue of his office. He collected a gross sum as his taxable costs or fees in a suit before him, and the illegal charge was an item contributing to that amount, so that the act was an inseparable part of his official conduct, and the statute denouncing the penalty treats the taking of illegal or extortionate fees, in terms, as an official act. Sec. 34, ch. 28, Compiled Statutes, 1903 (Annotated Statutes, 9060). Counsel for defendant in error are mistaken in supposing that *Snyder v. Gross,* 69 Neb. 340, and *State v. Porter,* 69 Neb. 203, are in conflict with the foregoing. The former of these latter cases was an instance in which it was attempted to hold the sureties of a justice of the peace liable for an act entirely foreign to any duty enjoined upon him in connection with his office, and in the latter of them it was sought to recover fees received for services not attempted to be required of the secretary of state, but of the person who happened to hold

that office as a supposed member of an unconstitutionally and illegally constituted official board or commission. He certainly did not receive them by virtue of his office as secretary of state, and, in the opinion of the writer, the decision goes to the furthest limit of linguistic propriety in saying that they were taken by color of that office. They were taken under color of the void statute.

We are of opinion, therefore, that the judgment of the district court dismissing the action as to the defendant in error is erroneous, and recommend that it be reversed and a new trial granted.

OLDHAM, C., concurs. LETTON, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court dismissing the action as to the defendant in error be reversed and a new trial granted.

REVERSED.

FRED FELSCH ET AL. V. ALICE BABB ET AL.

FILED DECEMBER 7, 1904. No. 13,460.

1. **Jury: IMPANELING: DISCRETION OF TRIAL COURT.** A trial court has a large discretion in sustaining challenges for cause of persons drawn as talesmen to serve as jurors, and its exclusion of such a person cannot be successfully assigned for error when it is not shown by the party objecting that by reason thereof an incompetent juror has been included in the panel, and it does not appear that the court has committed an abuse of discretion.

2. **Review.** The mere fact that a bailiff who summoned a talesman who served as a juror was afterwards called and testified as a witness for the successful party is not assignable for error.

3. **Verdict.** Under the circumstances of this case the damages awarded by the verdict are not so exorbitant as to be evidence that they were assessed under the influence of passion or prejudice.

4. **Action for Personal Injuries: TRIAL.** Although a plaintiff in an action to recover damages for personal injuries may be permitted

to show his wounds and contusions to the jury, it may be reversible error to permit a dramatic exhibition by him in the presence of the jury as a demonstration of the extent of his physical disabilities.

5. **Joint Petition in Error.** When two or more persons join in a petition in error in this court, no error can be availed of that is not prejudicial to both or all of them.

ERROR to the district court for Stanton county: GUY T. GRAVES, JUDGE. *Affirmed.*

Barnhart & Free, for plaintiffs in error.

W. W. Young, William V. Allen and *Willis E. Reed, contra.*

AMES, C.

This is an action by a married woman, in her own behalf and as next friend of her two minor children, to recover damages from the defendants, a saloon keeper, and the surety on his bond, for having incapacitated the husband and father by causing his intoxication, and for personal injuries resulting therefrom. There is sufficient evidence in the record to justify the jury in having found the following facts embraced within the issues made by the pleading, and they will therefore be stated as though not in dispute. There was a verdict for the plaintiffs for $2,000, from a judgment on which the defendants prosecute error.

The husband was a man about 51 years of age, who was afflicted with congenital curvature of the spine, but was otherwise in good health, or, at least, sufficiently so to earn, and he did earn until the happening of the event complained of, sufficient money to support his family in the degree of comfort usual or customary in his station in life, which was that of a common laborer. He was not accustomed to steady employment, but earned his livelihood by doing odd and miscellaneous jobs such as are ob-

tainable by a man of all work owning a team and wagon in a thriving village of several hundred inhabitants. He had lived in the village a good many years, and his earnings varied from $600 to $900 a year. The exact amount is not ascertainable, but sufficient, as already said, to support his family comfortably, and to clothe his children decently and enable them to attend the public schools. He was, however, as was well known in the community and to the defendant Felsch, addicted to the excessive use of intoxicating liquors, which, possibly in some degree on account of nervous instability connected with his malady above mentioned, affected him injuriously. On the morning of the 15th day of November, 1901, Babb visited the saloon of the defendant Felsch, and became extremely intoxicated by liquors which he procured and drank therein. Immediately upon leaving the saloon he attempted to ascend a stairway of an adjoining building, and, because of his intoxication, fell some distance to the foot of the stairs, where he was shortly afterwards found insensible and removed to his home. There was a contusion on the left side of the head, but the patient shortly afterwards recovered consciousness and the control of his physical and mental faculties. Two or three days afterwards paralysis of the right side supervened to the extent of practical helplessness, and continued thence to the time of the trial, and is seemingly permanent. There is a conflict in the evidence, or rather it is conjectural from the evidence, whether the paralysis arose from the wound on the head, or the shock of the fall, or from the disease or malformation of the spinal column, or from the effects of wounds received many years previously, or from a condition of the system induced by a long habit of drunkenness, or from the united influence of all or some of these conditions. We do not deem ourselves more capable of making an intelligent guess in the premises than were the jury, and shall not attempt to revise their finding.

The first assignment of error is that the court excused a juror drawn as a talesman upon the objection that the

sheriff had "failed to carry out the instruction of the court in summoning from the body of the county and outside of Stanton and the precinct where this transaction took place." Under the circumstances of local excitement concerning the litigation, we do not think the court erred, especially inasmuch as it is not contended that an equally competent and impartial juror was not substituted in his place. A trial court has and ought to have a wide discretion in sustaining challenges for cause, especially in cases of persons called as talesmen, whose incompetency may be apparent in many ways difficult to reflect from the record of an examination upon a *voir dire*.

It is secondly assigned for error that a talesman who was called, and who served, in substitution for the one above mentioned, was summoned by a bailiff who was afterwards sworn as a witness for the plaintiff; but as no complaint is made with reference to the competency of this juror, and as it does not appear that the bailiff acted corruptly or was interested in the suit, the fact does not appear to be material.

It is next complained that the damages are excessive, appearing to have been given under the influence of passion or prejudice, the ground of the complaint being, in substance, that Babb was before the happening of the injury a physical and moral wreck from some or all of the causes, other than the fall, above detailed, and that his ability and usefulness as a wage earner had ceased to be of any appreciable value or, at all events, were of very much less value than the sum awarded. But this is not the whole of the story. However small may have been his earning capacity before the injury, he was not before that time, as he has been since and apparently will continue to be, a confirmed invalid and a burden upon his wife and children for his own subsistence and for nursing and medical attendance. These and like circumstances would have been properly taken into account by the jury, and doubtless were so, in determining the amount of the recovery. That their consequences were and are largely conjectural goes

without saying, but greater certainty is not attainable in such cases, and the inferences to be drawn from them are peculiarly within the province of the jury, and we do not feel warranted in saying that $2,000 is so obviously an exorbitant award as to warrant the presumption that they were influenced by improper motives.

There is one other circumstance of the trial, disclosed by the record and complained of by the plaintiffs in error, which tends to support the complaint of the plaintiffs in error in this regard, and which, if we regarded the damages allowed as in any considerable degree too liberal in amount, would in our opinion require a reversal. Babb was produced and sworn as a witness for the plaintiffs at the trial, and in the course of his examination in chief the following comedy was enacted. We quote from the brief of the plaintiff in error, the correctness of which, in this particular, is not disputed:

Q. Now, Mr. Babb, I wish you would get down here, if you can walk, and show how you walk, and if not, you—

The counsel for the plaintiffs at this time ask the witness to present his right arm and leg, and in fact his whole person to the jury for examination, and exhibit to them his capability to walk and handle articles with his hands. To this request the defendants object for the reason that it is not in the form of a question, being an exhibition to the jury, and is not sufficiently defined as to give counsel for the defense an opportunity to know what to expect as a result. Objection overruled: To which ruling the defendants except. The witness here came down off the witness stand without assistance, and with the assistance of his wife took off his coat and rolled up his sleeve.

Q. Raise up that arm, if you can, Mr. Babb. (Witness raises his arm up partially.)

Q. Take hold of that chair. (Witness endeavors to raise chair, and moves it a little.)

Q. Is that the best you can do with it?

A. Yes, sir. (Witness turns up his sleeve on left arm.)

Q. You may state if there is any feeling in this left arm.

A. Not to amount to anything. I can feel the touch, but cannot feel a pin if stuck in.

Q. Can you lift with that arm?

A. Yes, sir.

To this procedure the defendants interposed an objection on the ground of improper examination of the witness, which was overruled.

It is a too well settled rule in this court to call for further discussion that the plaintiff in an action for damages for personal injuries may be permitted to exhibit to the jury, if he can do so, the contusions and wounds of which they consist. Such is also, we think, the practice in most courts in this country. *Louisville, N. A. & C. R. Co. v. Wood,* 113 Ind. 544; *Citizens' Street R. Co. v. Willoeby.* 134 Ind. 563; *Schroeder v. Chicago, R. I. & P. R. Co.,* 47 Ia. 375. But in *Hatfield v. St. Paul & D. R. Co.,* 33 Minn. 130, it was held that it was not error by the trial court to refuse to permit the plaintiff in such an action to walk across the court room floor in the presence of the jury for the purpose of demonstrating the degree of her lameness. Manifestly there is no means of ascertaining in the case of such an exhibition whether the apparent disability is real or simulated or to what extent it is either, or, in other words, as respects the movements made by the witness, there is no opportunity for cross-examination, and the practice, by well trained witnesses with some histrionic talent, might be the cause of gross impositions upon both the court and the jury. Neither can it ever be necessary to the due administration of justice; and, the nature and extent of the injuries having been proved, it can have no object but to stir the emotions of the jury preparatory to an appeal to their passions and prejudices. But in this case, as we have said, the verdict is not such as to indicate to us that the passions of the jury were so influenced, and we are of opinion, therefore, that the error was without prejudice.

The liquor license bond was executed by the plaintiff in error, the United States Fidelity and Guaranty Com-

pany, as sole surety; and it is contended that the bond and license are both void, because the statute requires that the bond of a licensee shall be signed by two freeholders of the county. This defense, if in any case it would be good as to the company, as to which we express no opinion, is not available to the saloon keeper, because section 11 of the liquor act enacts that unlicensed dealers shall be liable to the public and individuals in the manner and to the like extent as though they had "given bonds and obtained license." As to him, therefore, the question is immaterial. The petition in error is joint, and under a long established rule of this court, the judgment will not be reversed for any error not affecting both parties.

There are numerous other errors assigned having reference to the giving and refusal of instructions and to the conformity of the verdict thereto, and to rulings upon the admission and rejection of evidence, but we think that they are sufficiently treated of, in a general way, in the foregoing discussion, and that nothing of importance would be gained by setting them forth here in detail. Upon a consideration of the whole record, we are of opinion that it discloses no reversible error, and recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

SUPREME COURT OF HONOR V. CLARA A. TRACY.

FILED DECEMBER 7, 1904. No. 13,662.

Law of Case. The precise question decided by this court upon appeal or error cannot be relitigated upon a retrial of the same case in the district court.

ERROR to the district court for Adams county: ED L. ADAMS, JUDGE. *Affirmed.*

Tibbets Bros. & Morey and *W. B. Risse,* for plaintiff in error.

John C. Stevens, contra.

AMES, C.

This case has twice previously been before the court, and in both instances it was extensively briefed, argued at length orally, and at length and formally decided. The first opinion was written by Mr. Commissioner ALBERT, and concurred in by Mr. Commissioner DUFFIE and myself, and is published, unofficially, in 4 Neb. (Unof.) 189. The second opinion was upon a rehearing and written by Mr. Commissioner DUFFIE, and concurred in by Messrs. Commissioners POUND and KIRKPATRICK, and is also published, unofficially, in 4 Neb. (Unof.) 195. The suit is brought for a recovery by the beneficiary of a member of a fraternal benefit life insurance company, and involves an interpretation of the charter and by-laws of the association. A trial in the district court resulted in favor of the association, which by the first decision was reversed and the cause remanded for a new trial. Upon the rehearing the former decision was adhered to and a mandate was issued accordingly. Upon a new trial upon precisely the same record that had been presented in this court, the district court, in strict obedience to the opinions accompanying the mandate, rendered a judgment for the plaintiff, there being no dispute as to the facts, and the sole question of law involved having been determined in the manner above stated by this court. The association now prosecutes this proceeding, alleging, in substance, that the district court erred in obeying the mandate, and seeking to reargue the questions twice previously decided here. Nothing has been brought to our at-

tention indicating to our minds that the former decisions erroneously interpreted the contract, but, if there had been, we should be of opinion that the precise question decided in this court upon appeal or error cannot be relitigated upon a retrial of the same case in the district court.

It is recommended that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

PETER MICHAELSON ET AL., APPELLANTS, V. VILLAGE OF TILDEN, APPELLEE.

FILED DECEMBER 7, 1904. No. 13,667.

Cities: DETACHING TERRITORY: REVIEW. A judgment of the district court in a proceeding under the statute, section 101, article I, chapter 14, Compiled Statutes, 1903, to detach territory from a municipal corporation, will not be impeached upon appeal in the absence of a showing that the trial judge committed an important mistake of fact, or made an erroneous inference of fact or of law.

APPEAL from the district court for Madison county: JOHN F. BOYD, JUDGE. *Affirmed.*

Mapes & Hazen, for appellants.

F. L. Putney, contra.

AMES, C.

This record is of so unusual an aspect that it presents neither an issue of fact nor a dispute of law. The action is a proceeding by owners in severalty of contiguous tracts

of land to procure their detachment from the village of Tilden. The petition was granted as to several of the tracts, but, with respect to two of them lying immediately adjacent to one of the more settled regions of the village, it was denied, and the owners of these tracts have brought the case to this court by appeal. There was no testimony offered on the trial except that of one of the appellants, and no evidence, other than public records, except a plat or sketch of the site of the village attached as an exhibit to the bill of exceptions, and showing the relative positions of some of the neighboring buildings, streets and tracts of land. The statute provides, section 101, article I, chapter 14, Compiled Statutes, 1903 (Annotated Statutes, 8776): "If the court find in favor of the petitioners, and that justice and equity require that such territory, or any part thereof, be disconnected from such city or village, it shall enter a decree accordingly," which either party may have reviewed in this court by appeal or proceedings in error. In the absence of evidence of any specific fact or circumstances tending to impeach the justice of the decree, we do not see how we can intelligibly revise it. It is true that we have a general description in the testimony, and by the exhibit, of the land involved in the dispute, and of the adjacent tracts within the village, but these afford us far less accurate and comprehensive knowledge of the situation and surroundings than were, presumably, possessed by the trial judge, who is not unlikely to have been personally familiar with both, and whose judgment may therefore have been influenced by evidence of the most weighty character which is not reflected from the bill of exceptions. If the record disclosed anything from which it might be contended that the judge committed an important mistake of fact, or had made an erroneous inference of fact or of law, the case would be other than it now is, and might call for a review, and a reversal or affirmance of his findings and judgment; but, although the case is by permission of the statute here on appeal, we do not see how his determina-

tion can be impeached for want of equity, in the absence of apparent error in some of the respects named.

It is recommended that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

CITY OF SOUTH OMAHA V. R. JOHN SUTLIFFE, A MINOR, BY ANNA SUTLIFFE, HIS NEXT FRIEND.

FILED DECEMBER 7, 1904. No. 13,569.

1. **Instruction:** MEASURE OF DAMAGES. Under the issues involved in this case, *held* not error to omit from a general instruction on the measure of damages any reference to the social standing of plaintiff's mother.

2. **Instructions** examined, and *held* to not permit a recovery for loss of earnings during plaintiff's minority.

3. **Evidence:** CARLISLE TABLE. While the Carlisle and other mortuary tables of accepted accuracy and in general use are always properly admissible in evidence for the purpose of aiding a court or jury in determining the probable expectancy of life, when such fact is in issue, yet, when admitted, these mortuary tables are not binding upon the estimate of the triers of such fact. They may, without such tables, make their own estimate from the age, health, habits, physical condition and appearance of the person whose expectancy is at issue.

4. **Case Distinguished.** *Chicago, R. I. & P. R. Co. v. McDowell*, 66 Neb. 170, examined and distinguished.

5. **Action for Personal Injuries:** PLEADING: EVIDENCE. In actions for personal injuries, it is not necessary to specially allege every indirect injury to each part of the body to lay the foundation for such proof on the trial; such proof may be admitted when the injury alleged is shown to have been the natural and proximate cause of the injury proved.

6. **Expert Testimony.** When medical testimony is relied upon to prove

the cause or effect of a physical injury, it seldom goes further than an opinion based on the experience of the witness and the general learning of the profession. Positive statements of fact are seldom indulged in by physicians when testifying as experts, and yet this character of testimony is universally admitted by the courts of this country.

7. Review. Actions of the trial court in the exclusion of evidence examined, and *held* not prejudicial.

8. Remittitur. Award of damages examined, and *held* excessive; but *held*, further, that such excess may be cured by a remittitur of $3,000 from the judgment of the lower court.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed upon condition.*

A. H. Murdock, for plaintiff in error.

T. J. Mahoney and *H. C. Murphy, contra.*

OLDHAM, C.

This is an action for personal injuries received by plaintiff, a minor of the age of three and one-half years, who was thrown from a seat on the front end of a delivery wagon, in the city of South Omaha, and injured in a manner which will be hereafter described. The suit was brought by his foster-mother, as next friend, against the city of South Omaha, and resulted in a verdict and judgment for $10,000 damages, and to reverse this judgment the defendant city brings error to this court.

The facts underlying this controversy are that, when about one year old, plaintiff was abandoned by his father and mother, Richard and Cora Hooten, and given into the care and control of his aunt, Mrs. Anna R. Sutliffe, who, subsequently, legally adopted the child as her own. Mrs. Sutliffe resided with the plaintiff at the village of Bellevue, Nebraska, about six miles distant from the defendant city. On the morning of the injury (July 17, 1902) she left the plaintiff with his brother, who was about six years old, at her home in Bellevue, and went on

business to Omaha and Council Bluffs; after she had gone, a young man by the name of Lee, who was acquainted with the children, asked them to ride with him in his delivery wagon to South Omaha. The seat on the delivery wagon extended out to, and even with, the front end of the wagon. The plaintiff sat in the middle of the seat between the driver and his older brother. In this manner they rode to the city and transacted such business as the driver had in charge, and on the return home, while driving along 24th street of the defendant city, the front wheel of the wagon went into a deep ditch, or gully, which had remained for a long time in the street, and which was obstructed from view by muddy surface water, and, as a result of this accident, plaintiff was thrown forward with his head immediately in front of the wheel of the wagon, which passed over the right side of plaintiff's head, tearing off the scalp, commencing at the corner of the right eye, and passing in a semicircle upward and downward to a point above and behind the right ear, at the highest point of the semicircle abrading the periosteum to the extent of about one-half inch, turning the scalp down over the plaintiff's ear, and grinding the filth from the street into the wound. After the injury, plaintiff received prompt and efficient medical treatment at the hospital, and later at his home. This treatment was continued for a period of two months, and until the child became convalescent.

There is no complaint in the brief of the defendant city as to the sufficiency of the evidence to establish its liability for the injury, but its very able and exhaustive brief is directed entirely to an attack on the instructions of the trial court on the measure of damage, and to the rulings of the court on the admission and exclusion of testimony bearing on this question. We will examine these complaints as nearly as possible in the order in which they are presented in the city's brief.

The city in its answer alleged in mitigation of damages that plaintiff's mother was a woman without character

or reputation, and had abandoned plaintiff when he was one year old. This allegation was conceded to be true, and it is urged that the court should have given this admission in instructions to the jury to be considered in estimating the quantum of plaintiff's damage. There are two sufficient reasons, we think, why the court did not err in including this admission in his general instruction on the measure of damages. One is that plaintiff did not allege in aggravation of damages any injury to his social position, and the other is that the city did not request an instruction submitting the question of the social standing of plaintiff's parents to the jury; and, again, plaintiff's social status would be affected rather by the reputation of his adopted parent than by that of his mother, under the admitted facts in this case.

It is next objected that the instruction stating the issues to the jury did not point out clearly what the material issues were. An examination of the record shows that no exception was taken to the two instructions setting out the issues. In addition to this, however, we think that the issues were fairly and clearly set out in these instructions.

The next complaint to which our attention is directed is as to the action of the trial court in giving paragraph 11 of instructions on its own motion. This instruction is as follows:

"If you find for the plaintiff, it will be your duty to determine from the evidence the amount of his damages, which should be actual compensation for his injuries. In doing so, you should carefully consider from the evidence, the nature, extent and character of the injuries sustained, you should also determine whether or not the injuries to the plaintiff are permanent, and you should allow him for all damages which naturally and directly result from his injuries, whether in the past or in the future. You should allow him such damages for bodily pain and mental anguish as under the evidence you believe him entitled to, and you should allow him such damages for

physical and mental disability, if any such there be, as from the evidence you believe him entitled to. The law establishes no rule by which to fix the amount of damage for bodily pain and mental anguish, but leaves it to you to determine from the evidence the reasonable amount thereof. If you should find from the evidence that the plaintiff will suffer damage by reason of impaired capacity to earn money, if any such impaired capacity you find, then, in estimating this element of the plaintiff's damage, you must bear in mind the fact that under the law the plaintiff would not be entitled to his earnings until after he became 21 years of age, and you should not allow plaintiff any damages for what he might otherwise have earned before coming of age. There is no testimony in this case upon which you can allow plaintiff anything for expenses occasioned by his injuries."

It is alleged against this instruction that it permits the jury to award damages for the loss of earning capacity during the minority of the child, because of the clause which says: "You should allow him for all damages which naturally and directly result from his injuries, whether in the past or in the future." This reference to the future is interpreted as an authority for allowing damages for loss of earning capacity during minority. But this, to our minds, is a very strained and unreasonable construction of the charge. The portion of the charge in which this clause appears was directed to general damages which might be allowed if the injuries were shown to be permanent in their nature. The portion of the instruction which treats of the loss of earning capacity follows this in its logical order, and plainly and unmistakably tells the jury that they shall not consider any loss of earning capacity during the minority of the child.

It is also urged that there is no evidence in the record to sustain the charge as to the loss of earning capacity after plaintiff had reached his majority. This contention is based on the proposition that neither the Carlisle table

nor any other recognized tables of the expectancy of life were introduced by the plaintiff to show what his expectancy might be, and that consequently there was no testimony from which the jury would be justified in finding that he would ever arrive at the age of 21 years. While the Carlisle and other mortuary tables of accepted accuracy and in general use are always properly admissible in evidence for the purpose of aiding a court or jury in determining the probable expectancy of life, when such fact is in issue, yet, when admitted, these mortuary tables are not binding upon the estimate of the triers of such fact. They may without such table make their own estimate from the age, health, habits, physical condition and appearance of the person whose expectancy is at issue. *Deisen v. Chicago, St. P., M. & O. R. Co.*, 43 Minn. 454, 45 N. W. 864; *Beems v. Chicago, R. I. & P. R. Co.*, 67 Ia. 435, 25 N. W. 693; 2 Sutherland, Damages (3d ed.), 455; *Atchison, T. & S. F. R. Co. v. Hughes*, 55 Kan. 491.

It is further urged that the instruction is erroneous in failing to inform the jury that only such future damages can be allowed as are established with reasonable certainty. In support of this contention the decision of this court in *Chicago, R. I. & P. R. Co. v. McDowell*, 66 Neb. 170, is cited. An instruction in this case was condemned by this court because it permitted the jury to consider such injuries as plaintiff "may hereafter suffer," it being held that, to charge a jury so as to allow damages to the plaintiff that he *may hereafter suffer*, opens a wide field of speculation, and permits an award based on conjecture rather than on specific proof. But the instruction in the case at bar we do not think obnoxious to this objection, for the charge limits the award of damages to such as "naturally and directly result from his injuries." In other words, it limits the recovery to such damages as the jury believed did actually result from the injury. The court further said: "If you should find from the evidence that the plaintiff will suffer damages by reason of

impaired capacity of earning money," etc. Here there is no field for speculation or conjecture, as the jury under the direction of this charge must first find that plaintiff "will," and not that he "may," suffer damages, before making him any award.

For the purpose of examining the alleged errors committed by the trial court in the admission of evidence offered by plaintiff touching on the measure of damages, it is necessary to refer to the allegations of the petition with reference to the injury. The petition, after describing with particularity the injuries received by plaintiff, alleges that one of the parietal bones was caused to press downward upon the brain of plaintiff, thereby causing serious, dangerous and permanent injuries to body and mind. It also alleges that plaintiff's bodily health and mental condition have been seriously, dangerously and permanently impaired; that prior to the injuries plaintiff was an exceedingly bright boy, but that since the injuries he has become desultory and dull, and his mental and bodily activity has greatly deteriorated. Under this and other similar allegations plaintiff was permitted to show, over the objection of the defendant, that before the injury he could speak plainly, but that since the injury he was unable to speak without stuttering. That before the injury he was left-handed, but that since the injury he had changed from the use of his left to that of his right hand. That before the injury he had perfect control of his bladder, but that since the injury he had lost this control. It is urged against the admission of this testimony that plaintiff could not show those alleged injuries under the general allegations of the petition, and that, to render this testimony competent, there should have been a particular allegation of damages arising from each of these causes in the petition. The expert testimony offered by plaintiff tended to show that each of these effects were the logical result of the injury to the brain functions caused by pressure upon the brain by the parietal bone. In other words, if the plaintiff's medical experts were

correct in their conclusions, the change from left-handedness to right-handedness was occasioned by the partial loss of muscular control of the left side of the body, occasioned by the pressure on the right side of the brain; and the stammering and loss of control of the bladder came from the same cause; in short, that these manifestations were symptoms which tended to show an impairment of the brain functions caused by the accident. In actions for personal injuries, it is not necessary to specially allege every injury to each part of the body, to lay the foundation for such proof on the trial; such evidence may be admitted when the injury alleged is shown to have been the natural and proximate cause of the injury proved. In *Maitland v. Gilbert Paper Co.*, 97 Wis. 476, 72 N. W. 1124, the petition alleged an injury to one eye. The court received evidence showing an impairment of the other eye as one of the results of the injury. It was held, on review, that this was not erroneous, the court saying that "it could see no reason why evidence as to all the injury to plaintiff which followed naturally from the destruction of the left eye was not competent." To the same effect are the holdings in *Williams v. Oregon Short-Line R. Co.*, 18 Utah, 210, 54 Pac. 991; *Missouri, K. & T. R. Co. v. Edling*, 18 Tex. 171, 45 S. W. 406; *Quirk v. Siegel-Cooper Co.*, 56 N. Y. Supp. 49.

It is further urged against the admission of this testimony that the medical experts introduced by plaintiff only testified that, in their opinions, these effects were produced by the injury to the brain, and that they did not positively trace them to such injury. When medical testimony is relied upon to prove the cause or effect of a physical injury, it seldom goes further than an opinion based on the experience of the witness and the general learning of the profession. Positive statements of fact are seldom indulged in by physicians when testifying as experts, and yet this character of testimony is universally admitted by the courts of this country. *Peterson v. Chicago, M. & St. P. R. Co.*, 38 Minn. 511, 39 N. W. 485;

Block v. Milwaukee Street R. Co., 89 Wis. 371; *Turner v. City of Newburgh*, 109 N. Y. 301; *Lehigh & H. R. Co. v. Marchant*, 84 Fed. 870.

The next alleged error called to our attention is that with reference to the action of the trial court in excluding certain testimony offered from the deposition of Dr. Betts by the defendant. The evidence offered bore, if at all, very remotely on the measure of damage, and much of it was clearly incompetent. When objections were sustained to the questions propounded, defendant did not offer the answers contained in the depositions, and have a ruling of the court on such offer. Under the well-established rule of this court, when testimony is offered, and an objection is made and sustained to a question propounded, the party offering the evidence must follow the question with the offer of proof, to entitle him to a review of the ruling of the district court by this tribunal. Objections as to other evidence excluded are wholly unfounded, and do not require a further discussion.

After a careful review of the record in this case, we have failed to find any errors prejudicial to defendant in the trial of the cause, unless it be in the amount of damages awarded by the court and jury. It is plain that in suits of this nature, where the burden of the damage awarded falls upon the taxpayers of a city or village, who are, at most, only very indirectly responsible for the negligence occasioning the injury, the award should be confined strictly to such damages as are plainly compensatory. We also fully recognize that there is no rule by which an injury, such as the evidence in this case shows plaintiff to have suffered, can be estimated in dollars and cents. However, after much hesitation, and a careful review of the testimony bearing on the nature and extent of plaintiff's injury, we are inclined to think that the damages awarded are somewhat excessive. It appears to us that the evidence fairly shows that plaintiff, as a result of his injury, will bear a foreboding looking scar on his head and face during his natural life; that he may

suffer a partial paralysis of his left arm permanently; that the stammering and loss of control of the bladder are temporary injuries which time will cure; and that he has suffered great bodily pain and anguish from his injuries, but that this is of temporary and not permanent duration. Considering all these results of the injury, we think a $10,000 verdict against the city smacks somewhat of smart money, and is excessive.

We therefore recommend that, unless plaintiff enter a remittitur of $3,000 from the judgment awarded in the district court within 30 days from the filing of this opinion, the judgment of the district court be reversed and the cause remanded for further proceedings. But that if such remittitur is filed the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings, unless the plaintiff enter a remittitur of $3,000 within 30 days of the filing of this opinion; and it is further ordered that if such remittitur be filed the judgment of the district court be affirmed.

JUDGMENT ACCORDINGLY.

MARY J. BIXBY V. BARBARA E. JEWELL, ADMINISTRATRIX.

FILED DECEMBER 7, 1904. No. 13,653.

1. **Executors and Administrators:** SALE OF REAL ESTATE: REVIEW. In a statutory proceeding for a license to sell real estate by an administrator or executor, where no motion for a new trial is filed in the court below, we will, on error proceedings, examine the sufficiency of the pleadings to sustain the judgment.

2. **Special Proceeding.** An application to the district court by an

executor or administrator for license to sell real estate is not a suit in equity but a special statutory proceeding.

3. **Homestead, Sale of: VALIDITY.** A homestead of less value than $2,000 cannot be disposed of at administrator's sale either for the discharge of incumbrances thereon or for payment of debts against the estate of the decedent, and a license granted by the district court purporting to authorize such a sale is absolutely void. Following *Tindall v. Peterson*, 71 Neb. 160.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed.*

Mockett & Polk, for plaintiff in error.

George A. Adams, contra.

OLDHAM, C.

In this case Barbara E. Jewell, administratrix of the estate of Alexander Jewell, deceased, filed a statutory petition in the district court for Lancaster county for a license to sell the real estate of her intestate for the payment of the debts of the estate. Mary J. Bixby, one of the heirs at law of the decedent, filed objections to the issuing of a license on several grounds, the only one of which it will be necessary to examine is the 4th objection, which is as follows:

"This objecting heir further shows to the court that the farm of 156.88 acres was the homestead of decedent and his family at the time of his death, on or about February 7, 1897, and was at said time occupied by the decedent and his family as a homestead, and immediately upon his death the homestead right to the extent of $2,000 in said land descended to the widow, Barbara E. Jewell, for her lifetime, and upon her death to the children of Alexander Jewell, deceased, free and clear from all debts contracted by said decedent in his lifetime, and that said homestead is not liable for the payment of any claim set out in the petition filed herein."

The administratrix, by way of reply to these objections,

alleged that the objections were insufficient and did not state facts sufficient to stay the issuing of an order as prayed for in the petition; that the claim set out in the petition of $5,611 and interest is a prior claim against the estate, in that the larger portion of the money was furnished by the judgment creditor and claimant for the payment of mortgages and liens against said estate, and he is entitled to be and is subrogated by the order of this court to the rights of the mortgagees therein, which said mortgages were executed, signed and delivered by the said Alexander Jewell, deceased, and his wife so as to become and were liens upon and against said estate, and that the claimant in said claim, being subrogated thereto, is entitled to have said real estate sold, notwithstanding it may have been the homestead of the deceased. In other words, the reply admits the allegation of the objector that the lands were occupied as a homestead by the deceased at the time of his death, and have been since occupied as such by his widow and heirs. On issues thus joined, the district court found that the claims of Parkason J. Jewell and Zenith J. Jewell, amounting to $5,611, were for money furnished the estate for the payment of a mortgage and other liens, which existed prior to the death of Alexander J. Jewell, and were liens against said estate at the time of his death; that the homestead rights of the widow and family of the decedent are subject and inferior to the claim of said Parkason J. Jewell and Zenith J. Jewell. The decree grants the license, directs the property to be sold subject to the dower interest of the widow, which is to be subsequently determined on the coming in of the report of the sale; and, to reverse this judgment, Mary J. Bixby brings error to this court.

No motion for new trial was filed in the court below, and the only question we shall examine is as to the sufficiency of the pleadings to sustain the judgment. Under section 17, chapter 36, Compiled Statutes, 1903 (Annotated Statutes, 6216), the homestead descends to the survivor for life, and afterwards to his or her heirs forever, subject

only to the claims enumerated in the chapter, which are mechanics', laborers' and vendors' liens, and debts secured by mortgage as set out in section 3 of this chapter. The petition for a license to sell the real estate did not allege that any of the debts for which the license to sell was prayed were either mortgages or other statutory liens on the homestead. It is true the administratrix attempted to supply this averment by an allegation in her reply to the objections, yet the allegation only goes so far as to say that certain of the claims had been advanced by the claimant therein named for the payment of mortgages and other liens existing on the homestead before the death of the intestate. If, as alleged in the reply, the claimants therein named have paid mortgages and other liens existing against the homestead in the lifetime of the decedent, and the circumstances were such as to entitle them to be subrogated to the rights of the mortgagees or other lienholders, such claims, in a proper suit instituted for that purpose, may be enforced by a decree foreclosing the liens to which they have been subrogated; but these claimants have filed no pleadings of any kind in this proceeding, and, consequently, so much of the judgment and decree of the district court as declares the liens of these two claimants prior to the homestead right of the widow and heirs in the lands sought to be sold is wholly unsupported by the pleadings. In *Poessnecker v. Entenmann,* 64 Neb. 409, we held that the application to a district court by an executor or an administrator for license to sell real property is not an action in equity but a special statutory proceeding; and, again, in *McClay v. Foxworthy,* 18 Neb. 295, we held:

"A proceeding under the statute to sell real estate of the deceased for the payment of debts against the estate is not, strictly speaking, an action. It is purely a proceeding *in rem,* where the principal questions involved are, the amount of debts outstanding against the estate, the amount of personal property available for the payment of the debts, and the necessity to sell the land for which license is sought for the payment of the same."

Under this view of an application for license to sell real estate by an administrator, the only questions which should be determined in the proceeding are the amount of the indebtedness against the estate, the amount of personal property available for the payment of such debts, and the necessity to sell the land, and the character of the estate which is sought to be charged with the payment of the debts. When it was made to appear by the objections filed by one of the heirs and the reply of the administratrix that the estate sought to be sold was impressed with the character of a homestead, the court was without authority to proceed further until the homestead right had been admeasured and its value determined. In the recent case of *Tindall v. Peterson,* 71 Neb. 160, AMES, C., speaking for the court says:

"A homestead of less value than $2,000 cannot be disposed of at administrator's sale either for the discharge of incumbrances thereon, or for payment of debts against the estate of the decedent, and a license granted by the district court, purporting to authorize such a sale, is purely void."

We therefore conclude that the judgment of the district court decreeing the sale of the homestead, and declaring the alleged incumbrances of the claimants therein recited superior to the homestead right is unauthorized and void, and we therefore recommend that the judgment of the district court be reversed and the cause be remanded for further proceedings in conformity with this opinion.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for further proceedings in conformity with this opinion.

REVERSED.

JACOB THULL V. HARRY ALLEN.

FILED DECEMBER 7, 1904. No. 13,660.

Evidence examined, and *held* sufficient to sustain the judgment of the district court.

ERROR to the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

Millard & Snider, for plaintiff in error.

B. Ready, contra.

OLDHAM, C.

This was an action in forcible entry and detainer. Plaintiff had judgment of restitution in the court below, and defendant brings error to this court.

The first question called to our attention in the brief of plaintiff in error is that the evidence is not sufficient to sustain the judgment. It appears from the testimony in the bill of exceptions that defendant had leased the premises in dispute, in writing, for a period of one year from the first day of April, 1901, with the privilege of remaining another year if the premises were not sold. It appears that defendant had availed himself of this privilege and remained on the premises until the first day of April, 1903. On the 15th day of April plaintiff served notice, in writing, on defendant to surrender possession of the premises. This notice is offered in evidence, as well as the lease, and it was admitted in open court that plaintiff was the owner of the premises, and that defendant was in possession at and after the beginning of the suit. We think this evidence sufficient to sustain the judgment of the trial court. The presumption that defendant was holding by permission of the landlord after the expiration of the lease was fully overcome by the proof of the service of the notice to quit on the defendant. The evidence

showed that plaintiff prosecuted his suit diligently after the service of the notice, and there was nothing to indicate an acquiescence in defendant's wrongfully holding over.

It is further contended in the brief of plaintiff in error that the judgment of the district court is contrary to law, because the evidence shows that plaintiff had waived the breach of the lease by commencing a suit against the defendant for rent after instituting his suit of unlawful detainer. It appears from the record that the defendant in the court below laid the foundation to introduce the record of a subsequent suit for rent instituted by plaintiff against the defendant in the county court of Cedar county, but, after laying the foundation for this proof, the defendant neglected to offer the record of this proceeding, and counsel for plaintiff and defendant now dispute as to whether the suit for rent in the county court was for rent that accrued before or after the forfeiture. Without the record we are unable to determine this contention. These are the only two objections we have been asked to examine, and we therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JAMES P. MICHAELSON v. ALLEN D. BEEMER, WARDEN.

FILED DECEMBER 7, 1904. No. 13,975.

1. **Habeas Corpus. VOID JUDGMENT.** The writ of habeas corpus cannot operate as a proceeding in error. If a person is restrained of his liberty by virtue of an absolutely void judgment, he may be discharged on habeas corpus. To obtain release by such a proceeding, the judgment or sentence must be more than merely erroneous; it must be an absolute nullity. Following *In re Fanton*, 55 Neb. 703.

2. **Jurisdiction.** The judge of a district court has no jurisdiction to try and determine the guilt or innocence of a defendant charged with a felony who pleads not guilty, without a trial to a jury, and such jurisdiction cannot be conferred by consent of the accused.

3. **Void Commitment.** Where a prisoner is held under a void commitment, but is properly informed against by information or indictment charging a crime before a court of competent jurisdiction, on a habeas corpus proceeding he should be discharged from his confinement on the illegal commitment, and remanded to the custody of the court having jurisdiction of the information or indictment pending against him.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed with directions.*

T. J. Doyle and *Bishop & Anderson,* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, contra.*

OLDHAM, C.

On the 31st day of August, 1904, plaintiff in error was tried at a special term of the district court for Garfield county on a charge of grand larceny, and was found guilty and sentenced to one year's confinement in the penitentiary of Nebraska. No jury was impaneled at the trial, the state and prisoner agreeing to waive a jury. On October 6, 1904, an application for a writ of habeas corpus was made to one of the judges of the district court for Lancaster county for the release of the prisoner from the custody of the warden of the penitentiary. The application was denied, and the prisoner remanded to the custody of the warden, and from this order he prosecutes error.

There are no disputed facts in the record, and it shows that the prisoner was properly informed against by the county attorney of Garfield county on a charge of grand larceny; that he was duly arraigned, and tendered a plea of not guilty to this charge; that, by the consent of the

prisoner and the county attorney, a jury was waived and a trial had to the judge of the district court, which resulted in a verdict of guilty, and sentence by the court to one year's confinement in the penitentiary, and that the warden is holding the prisoner on a commitment issued on this judgment and sentence.

The first question presented is as to whether habeas corpus will lie in the case at bar, no error proceedings having been instituted for the purpose of reversing the judgment of the district court, on which the commitment was issued. We have frequently held that the writ of habeas corpus is not a corrective remedy, and is never allowed as a substitute for the plea of a writ of error. This rule is well stated in the case of *In re Fanton,* 55 Neb. 703, in which we held:

"The writ of habeas corpus cannot operate as a proceeding in error. If a person is restained of his liberty by virtue of an absolutely void judgment, he may be discharged on habeas corpus. To obtain release by such a proceeding, the judgment or sentence must be more than merely erroneous; it must be an absolute nullity."

This doctrine is supported by an unbroken line of authorities in both the federal and state courts of this nation, and consequently the question we are confronted with at the threshold of this controversy is, was the judgment and sentence of the district court absolutely void or only erroneous? The prisoner contends that the sentence and judgment were absolutely void, and the warden, through his counsel the deputy attorney general, contends that they were merely erroneous. To determine the construction of the constitution and statutes bearing upon the contention whether or not a citizen of this state charged with a felony or infamous crime may waive his right to a trial by a jury, it is proper to examine the public policy of the state with reference to the trial of persons charged with such offenses. The public policy of the state is always reflected from its constitution, its statutes and the decisions of its court of last resort. Section 3, article I of the constitu-

tion of Nebraska, provides: "No persons shall be deprived of life, liberty or property, without due process of law." Section 6, article I, provides: "The right of trial by jury shall remain inviolate." Section 11, article I, also provides, among other things, that in all criminal proceedings the accused shall have the right to a speedy trial by an impartial jury of the county or district in which the offense is alleged to have been committed. Section 296 of the code provides for the waiver of a jury in civil cases. There is no provision, however, in the code of criminal procedure for such waiver of a jury, but section 466 of the criminal code provides: "In all criminal cases, except as may be otherwise expressly provided, the jury summoned and impaneled according to the provisions of the laws in force relating to the summoning and impaneling of juries in other cases shall try the accused." In construing this provision of the statute we held in *Arnold v. State*, 38 Neb. 752:

"The statute was designed for the protection of the state as well as the prisoner. His consent could not change the law. The rights given him by a statute he could not waive; and, even by agreement with the state's prosecutor, the tribunal which the law provided for the trial of this issue could not be set aside and some other tribunal substituted."

This doctrine is supported by a long line of well considered cases in the various states of this Union, among which may be cited *State v. Carman*, 63 Ia. 130, 18 N. W. 691; *Cancemi v. People*, 18 N. Y. 128; *Harris v. People*, 128 Ill. 585, 21 N. E. 563; *State v. Lockwood*, 43 Wis. 403; *Williams v. State*, 12 Ohio St. 622; Cooley, Constitutional Limitations (7th ed.), 458; *Ex parte Smith*, 135 Mo. 223. If, then, the only tribunal provided by the constitution and laws of the state of Nebraska for the trial of one charged with a felony is a court and jury, it follows that the parties cannot by agreement constitute some other tribunal for this purpose. Consent of parties can waive jurisdiction of the person, but the law alone confers juris-

diction of the subject matter. If parties by consent could confer jurisdiction on a judge of a district court, which is withheld by the constitution and statutes of the state, then, by the same agreement, they might confer on a committing magistrate the jurisdiction to try and finally determine the guilt or innocence of one charged with a felony at his preliminary examination. When the information was filed in the district court for Garfield county charging in statutory language the prisoner with the offense of grand larceny, and he came into court either voluntarily or under the custody of the sheriff, the court became possessed under the laws of the state with the jurisdiction of the person of the defendant, and was authorized to make such orders touching the arraignment of the prisoner, his admission to bail, or commitment in default of bail, as the statute provides. But when the defendant pleaded not guilty, and the cause was set for trial on such plea, the only tribunal provided by the constitution and laws of this state that had authority to determine whether the defendant was guilty or innocent of the offense charged in the information was a jury summoned from the county in which the offense was alleged to have been committed. When the judge of the court, acting under a mistaken conception of the effect of the consent of the prisoner, undertook to determine the question of his guilt or innocence of the felony charged, his judgment and sentence based on such judgment was a mere nullity and absolutely void. From this line of reasoning it follows that the commitment under which the respondent warden detains the petitioner in the penitentiary is a legal nullity. It therefore follows that so much of the judgment of the district court as remanded the prisoner to the custody of the warden of the penitentiary is erroneous, and should be set aside.

It does not follow, however, as contended by counsel for the prisoner, that because the commitment under which the warden detains the prisoner is insufficient, the prisoner should be discharged from further proceedings, for it is

provided by section 358 of the criminal code, which governs habeas corpus proceedings, among other things: "When the said judge shall have examined into the cause of the caption and detention of the person so brought before him, and shall be satisfied that the person is unlawfully imprisoned or detained, he shall forthwith discharge such prisoner from said confinement. And in case the person or persons applying for such writ shall be confined or detained in a legal manner, on a charge of having committed any crime or offense, the said judge shall, at his discretion, commit, discharge, or let to bail such person or persons." Now, it clearly appears that an information properly charging the offense of grand larceny, to which the prisoner has pleaded not guilty, is pending against him for trial before a duly authorized tribunal in Garfield county, and the rule covering such case is that, if the commitment on which the prisoner is detained is insufficient, the court on habeas corpus will discharge the prisoner from that commitment, and will recommit him to the custody of the court having jurisdiction of the offense properly charged by indictment or information against him. *Ex parte Bennett,* Fed. Cas. No. 1,311, 2 Cranch (C. C.), 612; *In re Ring,* 28 Cal. 247; *Miller v. Snyder,* 6 Ind. 1; *In re Mason,* 8 Mich. 70; *Ex parte Badgley,* 7 Cow. (N. Y.) 472.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded, with directions to the trial court to discharge the prisoner from his confinement in the penitentiary on the warrant of commitment based on the void judgment and sentence of the judge of the district court for Garfield county, and that the prisoner be required to enter into a recognizance for his appearance at the next term of the district court for Garfield county to answer the charge of grand larceny therein pending against him, and that these proceedings and the recognizance so directed be certified to the district court for Garfield county, as provided by section 358 of the criminal code, and that in default of the recognizance so

directed the prisoner be committed to the jail of Garfield county, there to remain until discharged by due process of law.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to the trial court to discharge the prisoner from his confinement in the penitentiary on the warrant of commitment based on the void judgment and sentence of the judge of the district court for Garfield county, and that the prisoner be required to enter into a recognizance for his appearance at the next term of the district court for Garfield county to answer the charge of grand larceny therein pending against him, and that these proceedings and the recognizance so directed be certified to the district court for Garfield county, as provided by section 358 of the criminal code, and that in default of the recognizance so directed the prisoner be committed to the jail of Garfield county, there to remain until discharged by due process of law.

JUDGMENT ACCORDINGLY.

FRONTIER STEAM LAUNDRY COMPANY V. JAMES P. CONNOLLY.

FILED DECEMBER 7, 1904. No. 13,591.

1. **City Ordinance: BREACH: LIABILITY.** Whether a liability arising from a breach of a duty prescribed by statute or ordinance accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character, depends upon the nature of the duty enjoined and the benefits to be derived from its performance.

2. **———: FIRE PROTECTION.** An ordinance which requires the placing of fireproof shutters upon the windows of brick buildings within

a city imposes a duty for the purpose of giving to the public protection against fire which the common law did not provide.

3. ———: LIABILITY. Where in such city one is in possession of property as bailee, and it is destroyed by fire which spread from another building through windows unprotected by fireproof shutters, he is not liable for the value of such property by reason of the fact that he owned the building and that no fireproof shutters were provided as required by the ordinance.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Reversed.*

B. N. Robertson, for plaintiff in error.

W. H. Herdman, contra.

LETTON, C.

This is an action to recover the value of certain articles of personal property which had been delivered to the plaintiff in error, the Frontier Steam Laundry Company of the city of Omaha, for the purpose of being laundered, and which were destroyed by fire which spread to the premises of the steam laundry company from an adjoining building. The delivery of the goods to plaintiff in error for the purposes claimed is admitted by the pleadings, but the plaintiff in error asserts that it exercised due care and caution in the possession and preservation of the property, and that without its fault or negligence a fire which originated on the adjoining premises spread to its premises and destroyed the goods. It denies that it is responsible for the fire, or that it has been guilty of negligence in any manner in the care of the property. A paper marked "Reply" found among the files does not appear to have been filed, but since at the time of the trial leave was given to file a reply, and since the court in its instructions treated the issues as if this paper had been filed, we will consider the case as if the issues had been made up by the filing of the reply. The reply alleges that the negligence charged consisted in this: that the premises were

within the fire limits of the city of Omaha, that the buildings had windows within 40 feet of each other which were not covered by fireproof doors or shutters, as required by ordinance No. 4858 of the city of Omaha; that, by reason of the defendant's failure to cover said windows with fireproof shutters, the fire entered the defendant's premises and destroyed the plaintiff's property; that the fire entered only through the windows, and that, had the windows been covered with fireproof shutters, the fire would not have entered, and the goods of the plaintiff would not have been destroyed.

It may be questioned, under the evidence in this case, whether or not the ordinance which was introduced in evidence and which provided that fireproof shutters should be placed on the windows of brick buildings was of any force or effect as against the plaintiff in error, since the building appears to have been constructed long prior to the passage and approval of the ordinance, and it being penal in its nature could not be retroactive in its effect. This question, however, has not been distinctly raised in the case, and will not be decided. Assuming then that the ordinance was effective as to the premises, it remains to be seen whether or not a violation of its provisions constituted such negligence on the part of the plaintiff in error as would make it liable to persons whose goods were in its custody as bailee, and were destroyed by fire communicated through the unprotected openings. The only remedy provided by the ordinance for a breach of its provisions is a penalty of not less than $10 nor more than $100. It may be said that generally the penalty provided for a breach of the condition of an ordinance is the only one recoverable, but there is a further principle which is applicable in such cases, and that is that evidence of the violation of an ordinance usually tends to show actionable negligence where the consequences have ensued from its violation which are contemplated by the ordinance. *Omaha Street R. Co. v. Duvall,* 40 Neb. 29. Wherever a statute or ordinance creates a duty or obligation, though

it does not in express terms give a remedy, the remedy which is properly applicable to that obligation follows as an incident, but whether a liability arising from the breach of a duty prescribed by a statute or ordinance accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character, must depend upon the nature of the duty enjoined and the benefits to be derived from its performance. *Taylor v. Lake S. & M. S. R. Co.*, 45 Mich. 74; *Hayes v. Michigan C. R. Co.*, 111 U. S. 228, 240; 2 Cooley, Torts (3d ed.), 658; *Cook v. Johnston*, 58 Mich. 437, 25 N. W. 388. If the duty imposed by the ordinance is clearly intended for the protection and for the benefit of individuals or of their property, the violation of the rule prescribed tends to show negligence for which a recovery may be had; but where the duty is plainly for the benefit of the public at large, then the individual acquires no new rights by virtue of its enactment, and a violation of the rule is of no evidential value upon the question of negligence. It is not always easy to draw the line between the two classes of enactments. In fact, in some cases their purpose is both for the welfare of the public at large and also for the protection of the personal and property rights of individuals. In such case the individual may adduce the failure to perform the duty enjoined as evidence of negligence. The rule which is applicable can only be ascertained from a consideration of the object and purpose of the enactment itself in each particular case.

What then is the purpose of the enactment of the section under consideration? Is it for the benefit of the public at large, for the public safety, or is it for the benefit of persons whose property may be burned in buildings not provided with fireproof shutters? We are satisfied that the purpose of section 53 of the ordinance which requires the erection of fireproof doors and shutters upon brick buildings within the city is to protect the general public against the spread of fire. A fire which may inflict but a small amount of damage when confined to the place

of its origin, if allowed to spread, increases in intensity as it continues its career, and may, unless seasonably checked, inflict incalculable damages upon individuals and upon the public at large. The safety of life and property in large cities demands such precautions against the spread of flames as the ordinance requires. Ordinances prescribing such safeguards and protective appliances are everywhere upheld as a proper exercise of the police power of the municipality, exercised for the safety of the people and the preservation of their property. Their purpose, while it may incidentally benefit the individual who is required to thus safeguard his building, is for the benefit and safety of the public at large. They are not enacted primarily for the purpose of preserving buildings endangered by fire to the owners thereof, for, if a man neglects to protect his own property from fire, or if he chooses to destroy it himself, it is not the concern of the lawmaking power, so long as in so doing he does no act which affects the rights and privileges of other persons; nor are they enacted to make the owners of buildings who neglect to comply with such provisions liable for the loss by fire which may have spread to such buildings of the property of other persons contained therein. Under the view we take of the purpose of this portion of the ordinance, no liability attaches to the plaintiff in error on account of the destruction of the property, the value of which it is sought to recover in this action.

For these reasons, we recommend that the judgment of the district court be reversed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

REVERSED.

SEDGWICK, J., dissenting.

It is, and without doubt correctly, considered in the opinion that we are committed to the rule declared in

Omaha Street R. Co. v. Durall, 40 Neb. 29, that the violation of any statutory or municipal regulation, established for the purpose of protecting persons or property from injury, is evidence of negligence, when the other elements of actionable negligence concur. It is said in the opinion: "If the duty imposed by the ordinance is clearly intended for the protection and for the benefit of individuals or of their property, the violation of the rule prescribed tends to show negligence for which a recovery may be had, but where the duty is plainly for the benefit of the public at large, then the individual acquires no new rights by virtue of its enactment, and a violation of the rule is of no evidential value upon the question of negligence." It is also said: "In some cases their purpose is both for the welfare of the public at large and also for the protection of the personal and property rights of individuals. In such case the individual may adduce the failure to perform the duty enjoined as evidence of negligence." So that the holding in this case is that to protect the personal and property rights of individuals is no part of the object of the ordinance. To this proposition I cannot agree. The opinion finds the object of the ordinance to be "for the benefit of the public at large," that is, for the public safety, and it is directly stated in the opinion that "the purpose of section 53 of the ordinance which requires the erection of fireproof doors and shutters upon brick buildings within the city is *to protect the general public against the spread of fire.*" To protect the general public against the spread of fire is to protect the property of the people of the city generally from destruction by fire, and if the object is to protect the property of all of the people of the city, it certainly must be a part of the object to protect the property of each individual citizen.

2. While some of the principles announced, and the reasoning from which they are derived, seem to me to be wrong, the conclusion may, I think, be justified upon another ground. An ordinance, the effect of which may be to place so great a responsibility upon a citizen, and

which is penal in its nature, must be strictly construed. It ought not to be held to apply to buildings erected before its enactment unless its language plainly compels such a construction. The ordinance provides: "All brick buildings, except dwelling houses, schoolhouses, churches, and all strictly fireproof buildings, shall have fireproof shutters on every entrance on the rear walls and courts, with openings within 40 feet of each other; such shutters to be constructed to the satisfaction of the building inspector and chief of the fire department." This language might possibly be construed so as to apply to buildings constructed before its enactment, if it were not for the plain language of the title of the ordinance, which must be construed with it, and which seems to limit its effect to buildings constructed after its enactment. It is entitled "An ordinance regulating the construction of buildings and providing penalties." I do not think that the provisions of this ordinance could be so extended by construction as to impose a penalty and such severe consequences for a failure to protect with iron shutters the windows of buildings that had already been constructed when the ordinance was enacted.

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY V. AXSEL HAGBLAD.*

FILED DECEMBER 7, 1904. No. 13,623.

1. **Petition:** SUFFICIENCY. Petition examined, and *held* not to state a cause of action *ex contractu* against a common carrier, nor a cause of action at common law for the carrier's negligence.

2. ———: PASSENGER. Petition further examined, and *held* not to set forth facts sufficient to constitute the plaintiff a passenger so as to bring him within the provisions of section 3, article I, chapter 72, Compiled Statutes, 1903.

* Rehearing allowed. See opinion, p. 790, *post.*

3. **Carriers:** DUTIES. A railroad company owes only ordinary care to persons impliedly invited upon its platform who are not passengers.

4. ———: PASSENGER. In order to bring a person within the station house or upon the platform of a railroad station within the protection of the legal duties owing by a common carrier to its passengers, a person intending to become a passenger must go to the station at a reasonable time before the time fixed for the departure of the train upon which he intends to take passage, in a proper manner, and there, either by the purchase of a ticket or in some other manner, indicate to the carrier his intention to take passage and thus place himself in the carrier's charge.

5. **Pleading.** In order to state a cause of action upon the statutory duty of a railroad company to a passenger who has not actually taken passage upon the train, it is necessary that the facts stated show that the person suing is one of the class of persons to whom the remedy is afforded by the statute. To plead that he is a passenger, in a case where the existence of such relation to the carrier is at issue, pleads a mere conclusion of law and is not sufficient.

6. **Passenger.** From the time a passenger, as defined herein, places himself under the charge of the carrier as he begins his journey until he is afforded the opportunity to leave the premises of the carrier at its termination, he is "a passenger being transported," unless by some act not attributable to the carrier the relation ceases.

ERROR to the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

Benjamin T. White and *J. B. Sheean*, for plaintiff in error.

M. F. Harrington and *A. F. Mullen, contra.*

LETTON, C.

This action was brought by Axsel Hagblad, defendant in error, hereinafter styled the plaintiff, against the Fremont, Elkhorn & Missouri Valley Railroad Company, plaintiff in error, hereinafter styled the defendant. Judgment was rendered for the plaintiff below, and the defendant below brings error to this court. The sole error as-

signed is that the trial court erred in overruling the defendant's motion for a judgment on the pleading *non obstante veredicto*. The defendant, by a general demurrer, by seasonable objection to the introduction of evidence upon that ground, by motion for an instruction, and by motion for judgment *non obstante veredicto*, at every stage of the case challeneged the sufficiency of the allegations of the petition to state a cause of action against the defendant. The parts of the petition which are necessary to be set forth, in order to state the question involved, are as follows:

"1. The plaintiff for cause of action alleges that the defendant is a corporation duly organized under the laws of the state of Nebraska, and has been such corporation for ten years last past; that the defendant is a corporation engaged in the railroad business, and for ten years last past it has been a common carrier of passengers for hire upon its railroad, and has owned and operated a line of railroad in the counties of Madison, Antelope and Holt in the state of Nebraska; that Norfolk and Meadow Grove are stations upon the defendant's line of railroad in Madison county where it receives and delivers passengers on and from its trains, and that the defendant on the 28th day of December, 1902, was a common carrier carrying passengers from Norfolk to Meadow Grove, and that the station at Norfolk where such passengers are received is commonly known as Norfolk Junction.

"2. That on the 28th day of December, 1902, the plaintiff purchased from the defendant at Norfolk, Nebraska, a ticket entitling him to a safe passage on the defendant's train from Norfolk to Meadow Grove, and insuring him against injury while a passenger on said train and while a passenger on the defendant's premises at Norfolk; that while plaintiff was standing on the defendant's station platform at Norfolk on the evening of said day, and after he had purchased and paid the defendant for said ticket, and while he was a passenger on the defendant's premises, and while he was waiting for the arrival of the defendant's

train which was to carry him from Norfolk to Meadow Grove, he was struck by an engine and cars run and operated upon the defendant's railroad track at Norfolk, and which train was under the direction and with the knowledge, approval and consent of the defendant. That by being struck by said engine and said cars the plaintiff was thrown down, mangled, bruised and injured, and sustained the following injuries."

It will be observed that the petition does not allege that any act was negligently done. If the action had been brought against an individual for damages occasioned by his negligence which resulted in the injuries complained of, it would be essential to allege that the injuries were occasioned by the negligence of the defendant, either by setting forth facts which would constitute negligence as a matter of law, or by pleading generally that the defendant was negligent in performing or omitting to perform the acts complained of as constituting negligence. *Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456. The allegations of the petition under consideration do not set forth that the act by which the plaintiff was injured was done negligently, and no fact is alleged which constitutes negligence as a matter of law under the common law, nor by statute unless the plaintiff was one of a class embraced under the provisions of section 3, article I, chapter 72, Compiled Statutes, 1903 (Annotated Statutes, 10039), relating to injuries to persons while being transported over railroads in this state. Since the petition was assailed at every stage in the progress of the cause, the pleader will be presumed to have stated his case as fairly to himself as the facts will warrant, and the familiar rule applied that the allegations in the petition and all presumptions arising therefrom will be construed against the pleader, and no presumptions in his favor indulged in. Having these rules in mind, therefore, it will be observed that the only allegations of the petition which show the manner in which the plaintiff was injured are that, while plaintiff was standing on defendant's station platform at

Norfolk on the evening of December 28, 1902, he was struck by an engine and cars run and operated upon the defendant's railroad track, which train was run under the direction and with the knowledge, approval and consent of the defendant. That, by being struck by said engine and cars, the plaintiff was injured. Taking these allegations alone, without the aid of any presumptions, they appear to be somewhat inconsistent. The plaintiff, while standing on the platform, was struck by the engine and cars operated upon the track. The plaintiff stood presumably upon a safe and properly constructed platform, the engine and cars were presumably properly constructed and properly operated, and the track was presumably in good condition for the purpose of its construction. If we accept these facts as true, then, unless the plaintiff was so situated at the time of the accident that, though he was standing upon the platform, his body projected over the track in such manner that properly constructed and operated engine and cars might strike him, no injury could result. This being the case, the inference must be drawn that, presuming that the defendant was operating its trains with due care and caution, the plaintiff placed himself in a position that common knowledge would show to be one of danger. We conclude therefore that the petition fails to disclose any facts which constitute negligence on the part of the defendant as a matter of law irrespective of the statute, and does not state a cause of action if based upon a common law liability of the defendant.

The plaintiff contends that the petition states a good cause of action upon three grounds: First, it states a breach of contract to safely convey the plaintiff from the point where he purchased the ticket to the point of destination; second, it states a cause of action under the statute hereinbefore alluded to; third, it states a cause of action on the ground of negligence, by stating facts which as a matter of law constitute negligence on the part of the defendant.

As to the first contention, we think it clear that this petition is not based upon contract. No promise and no consideration therefor have been alleged. The petition alleges that the plaintiff purchased a ticket. While it is true that a railroad ticket is evidence of a contract between the carrier and the purchaser thereof, still the plea that the plaintiff purchased a ticket for a passage from Norfolk to Meadow Grove, without alleging that the defendant agreed to carry him between these points in consideration of the sum paid, and alleging further a breach of the contract, does not set forth an action *ex contractu*. 15 Ency. Pl. & Pr., p. 1125, and notes.

"There is a class of cases arising out of contract, where, by reason of the contract, the law raises a duty, for the breach of which duty an action on the case may be maintained; and in such cases the contract, being the basis and gravamen of the suit, must be alleged and proved. * * * But when the gist of the action is a breach of duty and not of contract, and the contract is not alleged as the cause of action, and when, from the facts alleged, the law raises the duty by reason of the calling of the defendant—as in case of innkeepers and common carriers—and the breach of duty is solely counted upon, the rules applying to actions *ex delicto* determine the rights of the parties." *Frink v. Potter*, 17 Ill. 406. See also *Wright v. Geer*, 6 Vt. 151; *Bank of Orange v. Brown*, 3 Wend. (N. Y.) 158; *M'Call v. Forsyth*, 4 W. & S. (Pa.) 179.

We conclude therefore that the gist of this action under the allegations of the petition is a breach of duty arising from the obligations imposed by law upon common carriers, and that it is not an action upon the contract of carriage.

We have already considered the third ground upon which the plaintiff asserts the petition is sufficient, and decided that his position as to this is unsound. There remains, however, to be considered the contention that the petition states a cause of action under section 3, article I, chapter 72, Compiled Statutes, 1903 (Annotated

Statutes, 10039), and this presents an important point for consideration. Section 3 is as follows: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." The plaintiff contends that under the allegations of the petition he was a passenger and was injured while being transported over the defendant's railroad, and that since this fact appears upon the face of the petition the liability of the company for damages sustained by him is fixed, unless, by proper pleading and proof as to the plaintiff's criminal negligence or violation of some rule or regulation actually brought to his notice, it relieves itself from the burden and from the conclusive presumption of negligence which is placed upon it by the statute. On the other hand, the defendant insists that a purchaser of a railroad ticket while standing on a station platform waiting for the arrival of a train on which he intends to take passage does not come within the class of passengers protected by the statute, and that such a person is not a "passenger being transported" over the carrier's road. And in this connection the defendant calls attention to the fact that the petition does not allege that the plaintiff was injured while attempting to alight from or board his train, or that he had begun his journey by taking passage on the train. It is obvious therefore that the determination of the question presented rests upon the inquiry whether a person who has bought a ticket and is upon a station platform awaiting the arrival of a train upon which he intends to take passage is a passenger being transported over its road.

Defendant argues that the common law recognized two classes of passengers, those being transported and those not being transported, and established different degrees of care, and in case of injury different rules as to the bur-

den of proof. That as to the first class the carrier was bound to exercise the highest degree of care which human skill and foresight could devise, and that an injury done to one of this class arising from defective roadbed, equipment or management was presumed to have been caused by the negligence of the carrier. That as to the second class, those not being actually transported, the carrier was only bound to exercise ordinary care, and from an injury to one of this class no presumption of negligence was raised against the carrier.

As to the first proposition there is no difference of opinion worthy of mention. The doctrine that the carrier must exercise the highest degree of care is accepted as the settled rule in nearly all jurisdictions. The reason for this rule is well stated by the supreme court of the United States in an early case, *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) *468, decided in 1852: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'" "Any relaxation of the stringent policy and principles of the law affecting such cases, would be highly detrimental to public safety."

As to the second proposition, however, the authorities are not uniform, one class of cases following the doctrine laid down in 2 Shearman and Redfield, Law of Negligence (5th ed.), sec. 501, as follows:

"When Ordinary Care Only Required. The requirement of extraordinary care, being founded upon the special risk of human life involved in the business of carrying passengers, is not to be extended to incidents of the business which do not involve such risk, and in which the carrier stands in the same relation to the passenger as do

other business men from whom such peculiar care is not required. Hence, while a carrier must use ordinary care to make the means of approach and departure and other accessories safe for the use of passengers, he is not required to use any higher degree of care with reference to these things. Therefore, with regard to platforms, stairs, waiting-rooms in a station, the ground surrounding it and other premises of a railroad company, its obligation to passengers is only one of ordinary care, in common with that of all other occupants of land or buildings, inviting persons to enter thereon, for compensation; since passengers are no more endangered, in such places, than they are in similar premises not belonging to a railroad company." *Pennsylvania R. Co. v. Marion*, 104 Ind. 239; *Kelly v. Manhattan R. Co.*, 112 N. Y. 443; *Lafflin v. Buffalo & S. R. Co.*, 106 N. Y. 136; *Falls v. San Francisco & N. P. R. Co.*, 97 Cal. 114; *Moreland v. Boston & P. R. Co.*, 141 Mass. 31; *Jordan v. New York, N. H. & H. R. Co.*, 165 Mass. 346; *Stokes v. Suffolk & C. R. Co.*, 107 N. Car. 178; *McDonald v. Chicago & N. W. R. Co.*, 26 Ia. 124; *Southern R. Co. v. Reeves*, 116 Ga. 743.

The other class of cases hold in the main that the carrier's duty to a passenger is the exercise of the highest care at all times that the relation subsists, from the time that a person becomes a passenger until he ceases to be such, his journey is completed and he has left the carrier's premises. A few of the cases holding the carrier to the same degree of care with reference to a person who has become a passenger, from the time he assumes such relation until within a reasonable time after his alighting from the train and departure from the platform or station at his destination, are the following: *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208, 97 Am. Dec. 96; *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667; *Knight v. Portland S. & P. R. Co.*, 56 Me. 234; *Warren v. Fitchburg R. Co.*, 8 Allen (Mass.), 227; *Dodge v. Boston & B. Steamship Co.*, 148 Mass. 207; *Weston v. New York Elevated R. Co.*, 73 N. Y. 595; *Norfolk & W. R. Co. v. Galli-*

her, 89 Va. 639; *Burke v. Chicago & N. W. R. Co.,* 108 Ill. App. 565; *Krantz v. Rio Grande W. R. Co.,* 12 Utah, 104, 30 L. R. A. 297; *Johns v. Charlotte, C. & A. R. Co.,* 39 S. Car. 162, 20 L. R. A. 520.

The question as to which of these two rules governs the liability of railroads for injuries to passengers upon their station platforms or premises in this state, as presented by the pleading in this case, depends upon the proper construction to be given to the phrase, "a passenger while being transported over its road." If the intention of the legislature was that this phrase should be construed literally, then a passenger not actually in process of being moved or carried from one point to another would not be within the protection of the statute. This court, however, has recently had occasion to construe this phrase to some extent. In the case of the *Chicago, R. I. & P. R. Co. v. Sattler,* 64 Neb. 636, 646, this provision is discussed with reference to the facts in that case, where a passenger left the train on his own volition for a purpose not incident to the journey. In that case it is said:

"We are agreed that the words 'while being transported over its road' is a qualifying phrase, intended to limit liability on the part of the company, and that we must give it the force intended by the legislature. We cannot, however, agree with the plaintiff in error that it was intended to exclude all passengers who leave the car provided for them by the carrier. It is well known that many —perhaps most—roads provide eating houses and other accommodations for the comfort or convenience of their patrons, and that regular stops are made for meals, requiring the passengers to leave the car in which they are being transported, and often to cross numerous tracks on their way to and from the car to the dining room or restaurant. In such cases one does not lose his character as a passenger in the course of transportation over the road, or the protection of the statute. The duty of the company to provide him safe egress and ingress for such necessities as are required on his journey, and which the road assumes

to furnish, and which it invites him to partake of, is no less stringent than to furnish him safe passage on its cars. While seated in the dining room of the company he is under its control, and must conform to its rules, as fully as while on the train; and, while thus subject to the rules and regulations of the company, he is their passenger, entitled to like protection from damage from the operating of the road as while seated in the car, proceeding on his journey. We believe and hold that it was intended to include in the words 'while being transported over its road' all passengers actually on the train, whether the same is in motion or standing on any part of the road: and it further includes those passengers leaving the train for any necessary purpose incident to their journey, such as a change of cars, or to procure refreshments at any point where the same is furnished by the company, and where an express or implied invitation is extended to the passengers to leave the car for that purpose." The phrase then is not in all cases to be literally construed.

If a person who has left the train for any necessary purpose incident to the journey, such as to procure refreshments at a point where the same is furnished by the company, is, while upon the platform on his way to the eating house and during his return to the train, "a passenger being transported" within the contemplation of the statute, is not the intending passenger who has purchased his ticket and who may walk side by side with him upon the station platform on his way to the same coach equally a passenger being transported? He is upon the company's premises furnished to him for the purpose of procuring his ticket and giving him access to the train, and has begun his journey. Should an injury occur to both, can one rule be applied to an action brought by the passenger who was returning from the dining room to the train, and another rule to the passenger who was walking with him from the waiting room or ticket office to the same train? Further than this, how can a reasonable distinction be drawn between the duty of the railroad company to the

passenger sitting in a train about to move from the station, and a passenger upon the platform, or in the station house, ready to take the train and begin his journey?

It is argued in the defendant's brief that the legislature, in adopting the language of the courts when defining the class of passengers entitled to the highest degree of care, adopted the same meaning and construction as was given to that language by those courts. But as we have seen the courts are not uniform in their holdings in this respect, and from the whole course of legislation and judicial construction within this state we believe that the legislature, by the use of the language quoted in the section under consideration, intended no more and no less than that every individual to whom the carrier owed the care due a passenger should, as long as the relation existed, be within its terms, but that when the relation ceases, either by voluntary disregard of reciprocal rights and duties of the passenger as in the *Sattler* case, or by disregard of the reasonable rules and regulations of the carrier on the part of the passenger, or by his criminal negligence, the carrier becomes absolved upon his part from the presumption of negligence created by the statute; or, to place the idea in other words, that from the time the intending passenger places himself under the charge of the carrier as he begins his journey until he is afforded the opportunity to leave the premises of the carrier at its termination, he is "a passenger being transported," unless by some act not attributable to the carrier the relation ceases.

When does the relation of carrier and passenger begin? With but minor differences depending upon the circumstances in each particular case, the courts are generally agreed upon this point. The general rule seems to be that where a person intending to take passage upon a train goes into a station within a reasonable time prior to the hour of departure of the train, in a proper manner, and there, either by the purchase of a ticket or in some other manner, indicates to the carrier his intention to take

passage, from that time on, while waiting for his train, he is entitled to all the rights and privileges of a passenger. In 4 Elliott, Railroads, p. 2459, note 1, it is said the true doctrine is announced by the supreme court of Massachusetts in *Webster v. Fitchburg R. Co.*, 161 Mass. 298. In that case a person who held a ten-trip ticket was struck and killed by a train when he was running rapidly from the direction of the public street across the defendant's premises outside of the passenger station to the track on which was an incoming train, apparently with a view to take another train which was about to start for Boston on the track beyond. It was contended that, inasmuch as he had previously obtained a ticket and was on the defendant's premises in a place designed for the use of passengers outside of the station, and was about to take a train, he had become a passenger. The court, however, say:

"One becomes a passenger on a railroad when he puts himself into the care of the railroad company to be transported under a contract, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for until the trip is begun, and then to be carried over the railroad. A railroad company holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, at a proper place to be carried. It invites everybody to come who is willing to be governed by its rules and regulations. In a case like this, the question is whether the person has presented himself in readiness to be carried, under such circumstances in reference

to time, place, manner, and condition that the railroad company must be deemed to have accepted him as a passenger."

The rule stated in this case has been approved and cited many times since its announcement, both by text writers and by courts, and we believe the doctrine stated to be sound. If the plaintiff has not brought himself within this rule he was not a passenger, and never became such in the eye of the law, and unless by the allegations of his petition he is within the class his petition will not state a cause of action. It will be observed that the petition contains no allegation in regard to the time when the train upon which he was intending to take passage was due to depart from Norfolk. It alleges the purchase of a ticket, but that alone does not make a person a passenger.

In *Illinois C. R. Co. v. O'Keefe*, 168 Ill. 115, 39 L. R. A. 149, it is said:

"One does not become a passenger until he has put himself in charge of the carrier and has been expressly or impliedly received as such by the carrier. * * * The purchase of a ticket does not make one a passenger unless he comes under the charge of the carrier and is accepted for carriage by virtue of it."

This case is reported in 61 Am. St. Rep. 68, with a monographic note upon the general subject of who are passengers and when they become such.

In *Illinois C. R. Co. v. Laloge*, 113 Ky. 896, 62 L. R. A. 405, the facts were that a passenger went to the railroad station five hours before her train was due, and was assaulted. A statute of Kentucky requires the ticket office and waiting room to be opened, lighted and warmed 30 minutes before train time. The court held that it was the duty of the carrier to provide such facilities for intending passengers within a reasonable time before the departure of its trains. That 30 minutes was a reasonable time, and that, by coming to the station five hours before the schedule time for the departure of the train, the plaintiff did not become a passenger. That there was no obliga-

tion upon the railroad to furnish accommodations for the entertainment for an indefinite length of time of those who contemplate in the future becoming its passengers. That there was no invitation, either express or implied, until within 30 minutes before train time, and that consequently it owed no duty to the plaintiff other or different from that owing to any ordinary person.

In *Phillips v. Southern R. Co.,* 124 N. Car. 123, 45 L. R. A. 163, the circumstances were that a person went to the railroad station five hours before train time. The carrier had a rule to close its waiting room until 30 minutes before the time of departure of each train. The night was cold, the plaintiff was ejected, and was injured by the contraction of a severe cold and subsequent illness. In the opinion the court say:

"A party coming to the railroad station with the intention of taking the defendant's next train becomes, in contemplation of law, a passenger on defendant's road, provided that his coming is within a reasonable time before the time for departure of said train. To constitute him such passenger it is not necessary that he should have purchased his ticket, as seems to have been considered by his Honor. 1 Fetter, Carriers of Passengers, sec. 288. But the purchase of the ticket would probably be considered the highest evidence of his intention. But still, it is his coming to the station within a reasonable time before, with the *intention* to take the next train, that creates the relation of passenger and carrier."

Another instructive case is *Louisville & N. R. Co. v. Reynolds,* 71 S. W. (Ky.) 516. The plaintiff had gone to the station to take a train at 11 P. M. His train was late, though he testified he did not know this. While he was standing on the platform about 15 feet from the track, he was struck by a piece of coal which fell from a train which was passing rapidly by with loaded coal cars, and was severely injured. The court said:

"Appellee was * * * rightfully on the platform, and sustained the relation of passenger to the appellant for he

was there to take the train, and, the waiting room being closed, had a right to be on the platform. It was train time, and so he had a right to come to the station at this time to take the train; and if it be true that he was told that the train was late, being at the station he had a right to remain there, and wait for it."

With these views we concur.

A railroad company is not bound to furnish a place of entertainment for persons who may intend at some future time to become passengers over its road, and such a person who resorts to its station, or who stands upon its platform exposing himself to such dangers and risks as may naturally and obviously occur at such a place by reason of rapidly moving trains, switching of freight cars, or engines passing by or by the moving of articles of freight, assumes and takes upon himself the risk of injury, and is entitled to the carrier's protection in no greater degree than any other licensee. Ordinary care under all the circumstances of the time and place is all he is entitled to. The fact that he may have procured a ticket is immaterial.

The relation of carrier and passenger does not begin until within a reasonable time prior to the time fixed for the departure of the train the prospective passenger intends to take, and not until he has in some manner, either expressly or impliedly, placed himself within the carrier's charge. If, within a reasonable time before the departure of the train he intends to take, he goes to the place provided for the reception of intending passengers, and there places himself actually or impliedly within the carrier's care, then, and not until then, the law places around him the protection vouchsafed to passengers, and charges the carrier with the highest degree of care for his safety. To hold otherwise would be to place a most unjust and onerous burden upon the carrier. In this day and age of "limited trains," "lightning expresses," "flyers," "cannon balls," as they are sometimes fancifully designated, many stations and platforms upon main lines of railroads are passed by such trains at rates of speed as high as 60 miles

an hour. If a railroad company were held to the same high degree of care to persons who are not passengers over its road, resorting to its stations to loaf or loiter, it would be compelled to moderate the rate of speed of such trains at every way station along its line, and otherwise would be compelled to interfere with the operation of its trains, and the proper conduct of its business, to preserve the safety and welfare of persons to whom it owed no duty. Such a rule would be intolerable, and has not been enacted by the section under consideration. In order to state a cause of action upon the statutory duty of a railroad company to a passenger, it is necessary that the facts stated show that the person suing is one of a class of persons to whom the remedy is afforded by the statute. To plead that he is a passenger, in a case where the existence of such relation to the carrier is at issue, pleads a mere conclusion of law and is not sufficient. This rule has been well stated in the case of *Harris v. Stevens*, 31 Vt. 79, where the plaintiff sued in trespass for removal from a railroad station house, and in his replication attempted to establish his right to be and remain at the station. The court sustained a demurrer to the replication, and entered judgment for the defendant. In the syllabus the court say: The right to enter and remain at a railroad station house extends only as far as is reasonably necessary to secure to the traveler the full and perfect exercise and enjoyment of his right to be carried upon the cars, and as to what is a reasonable time will depend upon the circumstances of each particular case. And in the opinion it is said:

"It is not alleged that it was the intent of the plaintiff to go upon the then next regular train, or that his ticket was for such train. For aught that is alleged his ticket may have been for, and his intent to go upon, one of those trains called excursion trains that are advertised to run at some particular time, and for which tickets are sold many days in advance of the time of departure. In this respect we think the replication is defective; the plaintiff

should have alleged that at the time, when, etc., he was at the station awaiting the departure of a train that was expected soon to leave, and on which he intended to go. The replication should show that the plaintiff was there intending to go upon a train that was expected to leave within such a short period of time thereafter, that, in view of the rule as before laid down, he would have the right to remain at the station until its departure. This replication, we think, does not show such a state of facts as are necessary to vest such right in the plaintiff, and therefore it is insufficient."

So far then from having brought himself within the class of "a passenger being transported" as the statute prescribes, plaintiff in this case has not even pleaded facts sufficient to show that he was a passenger under the non-statute law prescribing the qualifications of the class of persons embraced under that general designation. For these reasons, we are of the opinion that the petition does not state a cause of action under the statute, and that the demurrer and objections to the introduction of evidence should have been sustained.

A bill of exceptions was settled and allowed in the case, but, since the sole question presented is the sufficiency of the petition, we have not examined the same.

We recommend that the judgment of the district court be reversed and cause remanded for further proceedings.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

The following opinion on rehearing was filed March 8, 1906. *Former opinion modified:*

Carriers: PASSENGERS. Upon reexamination of the question, the sixth paragraph of the syllabus to the former opinion, *ante*, p. 773, is disapproved, and former opinion modified.

LETTON, J.

A rehearing of this case was granted mainly upon the question of whether the proposition laid down in the sixth paragraph of the syllabus of the former opinion, *ante,* p. 773, is a correct statement of the law. This praagraph is as follows: "From the time a passenger, as defined herein, places himself under the charge of the carrier as he begins his journey until he is afforded the opportunity to leave the premises of the carrier at its termination, he is 'a passenger being transported,' unless by some act not attributable to the carrier the relation ceases." No attack has been made upon the principles laid down in the former opinion as to when the relation of carrier and passenger begins, nor is the applicability of the rule questioned requiring the highest degree of care to be exercised by the carrier for the safety of a passenger, but it is earnestly contended that the proposition above quoted was unnecessary to a decision of the case and is unsound as a statement of the law. In *Chicago, R. I. & P. R. Co. v. Sattler,* 64 Neb. 636, it is said:

"We believe and hold that it was intended to include in the words 'while being transported over its road' all passengers actually on the train, whether the same is in motion or standing on any part of the road: and it further includes those passengers leaving the train for any necessary purpose incident to their journey, such as a change of cars, or to procure refreshments at any point where the same is furnished by the company, and where an express or implied invitation is extended to the passengers to leave the car for that purpose."

In our former opinion it was asked whether one rule could be applied to an action brought by a passenger returning from the dining room to the train, and another rule to a passenger walking with him from the waiting room or ticket office to the same train, and it was upon this statement in the *Sattler* case that the proposition herein attacked was founded. After further argument,

and upon more mature consideration, we are convinced that there is merit in plaintiff in error's contention, and that, as said in the *Sattler* case, we must give the qualifying phrase the force intended by the legislature. The difficulty lies in defining and limiting the class of persons who are "passengers while being transported over its road." When does the act of transportation begin and when does it end, and when, if ever, during the journey is the passenger not within the protection of the statute? We have held that this section makes railroad companies insurers of the safety of their passengers. *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689; *Chicago, B. & Q. R. Co. v. Landauer*, 39 Neb. 803; *Fremont, E. & M. V. R. Co. v. French*, 48 Neb. 638. Such an onerous burden should not be imposed to a greater extent than warranted by legislative sanction. In its brief, plaintiff in error concedes that the statute should apply to passengers who are getting on or off the platform and steps of the cars, and who are actually riding within the cars, but whether this is a proper limitation or not we are not called upon to determine in this case. It would seem, however, that, after a person becomes a passenger as laid down in the former opinion, the carrier is held to his common law liability alone until the time when the passenger is in the act of journeying, and that from the time that act begins until its termination, and during the necessary incidents of the transportation, he is "being transported." The discussion, in the former opinion and at this time upon this point, is rather academic than necessary to the decision of the case, and it is only for the purpose of avoiding misconceptions in the future that we thought it necessary to reexamine this question. Whether or not a passenger is a passenger "being transported" depends upon the circumstances of each particular case and, until the occasion arises, it is difficult, if not impossible, to draw an exact line between the two classes. Upon the whole, since it is unnecessary in this case to pass upon this question, we think it had better be left an open one for future consider-

ation, when it becomes necessary to the determination of an actual controversy in which discrimination and distinction between the two classes of passengers must of necessity be made. The sixth paragraph of the syllabus is therefore disapproved, and the opinion modified accordingly.

OPINION MODIFIED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. ALBERT SEVCEK.*

FILED DECEMBER 7, 1904. No. 13,655.

1. **Railroads: FENCES.** Where a railroad company outside the limits of a city, town or village has established a flag station, with platform, elevator, office and scales, coal house, corn-cribs, etc., for public use, it is not bound, under the provisions of the statute requiring railroads to be fenced, to fence its road in such a manner as to prevent the public from having proper access to its station grounds.

2. ———: ———. The failure to fence is excusable, however, only to an extent sufficient to afford the public and the railroad company necessary facilities for transacting the business reasonably to be expected at this locality.

3. ———: ———. It is the locality where animals pass onto the right of way that determines the liability of the company, as between a place where the statute requires it to fence its road and a locality which it is not required to fence.

4. **Killing Animals: LIABILITY.** Under the facts in this case, *held* that the railroad company was not excused from fencing its road at the point where the animals went upon the right of way, and that it was liable for the killing of the same.

ERROR to the district court for Howard county: CHARLES L. GUTTERSON, JUDGE. *Affirmed.*

J. W. Deweese and *Frank E. Bishop,* for plaintiff in error.

T. T. Bell, contra.

* Rehearing allowed. See opinion, p. 799, *post.*

LETTON, C.

The sole question presented in this case is whether or not the railroad company is liable for the killing of six hogs belonging to defendant in error, which were killed at a point within the station grounds at the station of Warsaw, in Howard county. Warsaw is a flag station on the line of the railroad, there is no town or village at the station, but there is a platform, side track, elevator, office and scales, stock-yards, coal house and corn-cribs. The railroad track runs nearly straight east and west, a side track being on the south side of the main track about 900 feet long. At this point for a distance of about 1,200 feet the right of way is 200 feet wide, on the north side of the track being 50 feet and on the south side 150 feet from the center line of the track. The elevator, stock-yards, corn-crib and coal house are all situated upon the south side of the track, while the platform is upon the north side. There is also upon these grounds a house which is occupied part of the year by a man who attends to buying and shipping grain at the elevator. A public highway runs across the right of way between the stock-yards and the elevator almost at right angles to the track. The evidence shows that Warsaw is a time-card station which has the time for the arrival and departure of trains set down; that no ticket office or waiting room is there, and no tickets are sold at the station, but that tickets are sold from other points to that place. There are usually from 40 to 50 car loads of freight a year, and grain, live stock, emigrant movables, and machinery, baggage and trunks, and people are loaded and unloaded at the platform, stock is shipped and received at the stock-yards, and coal received and sold at the coal house.

Section 1, article I, chapter 72, Compiled Statutes, 1903 (Annotated Statutes, 10020), requires all railroads to erect and maintain fences on the sides of their railroad sufficient to prevent cattle, horses, sheep and hogs from getting on the railroad, except at the crossings of public

roads and highways, and within the limits of towns, cities and villages, and requires them at all road crossings to maintain cattle-guards sufficient to prevent cattle, horses, sheep and hogs from getting onto such railroad, and makes the railroad corporation liable for damages to stock killed or injured where the fences and guards are not in sufficiently good repair to accomplish the object for which the same are prescribed. If this statute is to be construed literally, the only exception to the requirement of fencing is in public highways, and within the limits of towns, cities and villages; and, since Warsaw is neither a town, city or village, the defendant in error has no defense. Must the statute be strictly and literally construed? This statute has heretofore come before this court for construction with reference to the duty of the railroad company to fence near its switch tracks. In *Chicago, B. & Q. R. Co. v. Hogan,* 27 Neb. 801, where it was stipulated that the corporate limits of a city, with buildings thereon, extended along one side of the various side tracks of a railway, the land on the other side not being platted; that the side tracks were necessary for the business of the company, and that it would be inconvenient and unsafe to the employees of the company if the cattle guard and fence were erected, it was held that the railway company was not required to fence its tracks at that point. Upon a rehearing the former conclusion was reaffirmed, and the action was reversed and dismissed. 30 Neb. 686.

In *Union P. R. Co. v. Knowlton,* 43 Neb. 751, an animal was killed at a point about midway between the limits of the city of Lincoln and the village of West Lincoln. On the part of the railroad company it was contended that the point was within the actual limits of the Lincoln yard; that the track was in constant use in the making up of trains, and that a fence thereon would be dangerous to employees. The court say:

"It is conclusively shown that the defendant's depot grounds are situated more than a mile distant from the point of the collision. Nor is there in the record any

evidence tending to prove that the use of the track between Lincoln and West Lincoln was necessary in the making up of trains, or that the facilities afforded by the tracks within the yard limits were insufficient for that purpose. The most that can be claimed by the defendant is that it is convenient for it to use the track in question in making up its trains and that it was occasionally used for that purpose. The legislature could not have intended the provision of the exception above noted to include tracks outside of the limits of cities, towns and villages, remote as is this one from the depot grounds and side tracks and not necessary for use in making up trains."

In Minnesota a similar statute made no exceptions as to fencing within cities or villages, and the court held that there was no reason why the requirements of the act should not apply within cities and villages as well as in the country, and that other provisions of the law with reference to obstructing streets and highways would prevent the inclosure of the railroad track at such points. The court further said, however:

"There is another exception implied as to places required to be left open by the public necessity or convenience, such as grounds about stations which are used for the entrance or exit of passengers, or the receipt and delivery of freight; but this public convenience is the limit of the exception." *Greeley v. St. P., M. & M. R. Co.*, 33 Minn. 136, 22 N. W. 179.

The statute is an exercise of the police power of the state enacted for the welfare not of the railroad but of the people. The object of statutes of this nature is primarily the benefit of the public, and secondarily for the benefit of private individuals. In its construction, therefore, courts must give that construction which is most for the public benefit, and must consider in a secondary degree what is the interest of the individual. To enforce the statute accordingly the letter would effectually deprive the public of all the convenience and advantage obtained by the location of a railroad station, grain and coal market,

and stock-yard at that point, and would prohibit every railroad corporation from maintaining transportation facilities for the convenience of farming communities away from the limits of towns, cities or villages. It is not the benefit to the railroad that is to be considered so much as the welfare and convenience of the public. Every railroad company in this state is required by statute to furnish sufficient accommodations for the transportation of passengers and freight, and to take, transport and discharge all passengers to and from such stations as the trains stop at, from or to all places and stations upon their road, on the due payment of fare or freight bill. Under this section the railroad company is compelled to transport passengers to Warsaw upon the due payment of fare, and to furnish them proper facilities for access to or egress from their station platform. It is unreasonable to suppose that the law compels a railroad company to furnish facilities to the public, and at the same time it be compelled by another law to fence the public out from such facilities. This would be manifestly a forced construction of the law. The legislature certainly never intended to prevent a railroad company from furnishing such facilities to rural communities in which no town or village exists, where the demand justifies the giving of the same. As between the right of the public to thus be accommodated, and the danger of the loss to the owner of live stock by the straying of his animals upon the track, the benefit to the public is of more importance, and there is an implied exception to the strict letter of the statute which is dictated by sound reason.

We agree therefore with the contention of the plaintiff in error that a railroad company is not bound to fence its tracks in such a manner as to exclude the public from proper access to its station grounds. The failure to fence is excusable, however, only to an extent sufficient to afford the public and the railroad company necessary facilities for transacting the business reasonably to be expected at this locality. While the railroad company would be ex-

cused from fencing a sufficient portion of its right of way to allow the public access to the loading and unloading facilities there provided, it would not be excused for a failure to fence another or greater space. At the locality in question, however, we see no reason why the railroad company should not have fenced its right of way on the north side to connect with the fence on the west side of the highway, as well as to have fenced it to the highway fence on the east side of the road, as it actually did. It is the locality where animals pass onto the right of way that determines the liability of the company as between a place where the statute requires it to fence its road and a locality which it is not required to fence.

It appears from the plat that both sides of the highway running north from the right of way are fenced, and that the tract of land from whence the hogs went upon the right of way was not open to the public highway. To fence the right of way at this point would in no manner interfere with the access of the public to the transportation facilities afforded by the station. It was private property over which the hogs came, on which the public would be trespassers. Under the circumstances presented by this case the principle invoked by the plaintiff in error does not apply. We cannot speculate upon the proposition as to whether, even if the fence had been along the north side of the right of way, the hogs would have gotten onto the track by traveling east to the line of the highway. The plat in evidence shows a fence along the highway, but whether it is hog tight or not does not appear. There is no evidence to show that they came upon the right of way at the highway, and there is evidence to show that they came upon the right of way at a point where the track might have been fenced without inconvenience to the public or the employees of plaintiff in error. We believe it was the duty of the railroad company under the statute to have a fence at this point, and that they are therefore liable for the actual value of the hogs killed.

We recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed December 7, 1906. *Reversed:*

1. **Railroads: FENCES.** The intent of the statute requiring a railroad company to erect and maintain fences and cattle-guards along its line of road, is to compel the complete inclosure of the track, except in cities, towns, villages and necessary station grounds, so as to prevent access to the same at all points except public crossings.

2. ———: ———. Principles laid down in the first three paragraphs of the syllabus in former opinion, *ante*, p. 793, adhered to.

3. ———: ———. Fourth paragraph of syllabus to former opinion set aside.

LETTON, J.

In the former opinion in this case, *ante,* p. 793, it was held: "Where a railroad company outside of the limits of a city, town or village has established a flag station, with platform, elevator, office and scales, coal house, corn-cribs, etc., for public use, it is not bound, under the provisions of the statute requiring railroads to be fenced, to fence its road in such a manner as to prevent the public from having proper access to its station grounds." It was further held: "The failure to fence is excusable, however, only to an extent sufficient to afford the public and the railroad company necessary facilities for transacting the business reasonably to be expected at this locality." While we still adhere to the doctrines thus laid down, we are convinced that some of the language used in the discussion in the former opinion perhaps conveyed an erroneous impression, and in some respects failed to give due

prominence to the necessity of affording the railroad company proper facilities for the safe transaction of the business reasonably to be expected. If it were necessary for the public convenience and necessary to the proper operation of the railroad, carrying on the business with due regard and care for the safety of employees, that the track should be left unfenced at the point where the hogs came upon the right of way, then the railroad company would not be liable. The safety of the employees of the railroad in carrying on its necessary operations in the vicinity of the station must be considered, as well as the necessity of the public for access to the station grounds. It is contended by the defendant that as a matter of law a railroad company is excused from fencing its station grounds as far as its switching tracks extend in either direction, on account of the danger to employees which would arise from placing cattle-guards at any point where the men would be obliged to walk across them for the necessary operations of switching. It is a matter of common knowledge that, in the present stage of the evolution and development of railroad transportation, it has been thought advisable in many places in the state to construct long switching tracks or passing tracks, extending in many cases far beyond the limits of cities, villages or station grounds, and apparently designed eventually to become parts of a double track system. Carried to its full length, the defendant's contention would excuse a railroad company from failing to fence as far as these tracks extend, even though only used occasionaly; but this, we think, would be giving an improper construction to the statute. *Russell v. Hannibal & St. J. R. Co.*, 26 Mo. App. 368; *Chouteau v. Hannibal & St. J. R. Co.*, 28 Mo. App. 556. Under the statute the company must fence outside of the limits of cities and villages, except where excused by surrounding circumstances. If it plainly appear from the evidence that the locality is one where the proper conduct of the business, considering both public convenience and the operation of the railroad with regard to the safety of em-

ployees, requires that it be left unfenced, then the court may so declare; but where the question is one of doubt it is for the jury. *Cole v. Duluth, S. S. & A. R. Co.*, 104 Wis. 460, 80 N. W. 736. A point at which the company maintains merely a platform and a switch which is only used a few times each year cannot, in reason, be treated the same as another where a station is maintained, and where elevators, scales and corn-cribs for public convenience are found, and where freight is loaded and unloaded frequently. The fact that at a given point cars are occasionally loaded and unloaded and switched would not alone excuse a railroad company from fencing at that point; but, if the evidence showed that the public convenience and the reasonably safe operation of the defendant's business would be unduly hindered and interfered with by the inclosure of the tracks, then it would be excused from fencing. If the evidence should show that danger to employees was but little to be apprehended at a given point with the exercise of proper care and caution upon their part, then the fact that that point was used occasionally to receive and discharge freight or passengers would not excuse the company from fencing, except to the extent that the public convenience required it, and if the public could be served by inclosing all but a small portion of the track, then so far only would the company be excused. *Toledo, St. L. & K. C. R. Co. v. Franklin*, 159 Ill. 99; *Toledo, St. L. & K. C. R. Co. v. Cupp*, 9 Ind. App. 244; *Railroad Co. v. Newbrander*, 40 Ohio St. 15.

The statute requires the railroad company to erect and maintain fences on the sides of the railroad "suitable and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad," except at the crossings of public roads and highways, and within the limits of towns, cities and villages, and to construct and maintain at all road crossings cattle-guards suitable and sufficient for the same purpose. The intention of the statute seems to be to require the complete inclosure of the railroad track by means of fences and cattle-guards, so as to prevent

access to the tracks at all points except at public crossings. The defendant's answer presents the issue that the locality was a part of its depot grounds, and that public necessity and proper regard for the safe operation of its business required that it be left unfenced. This issue was submitted to the jury by an instruction based upon this allegation in the answer. The amount of switching done at this point was shown to be very small, and the evidence as to the danger to employees if the railroad had been fenced is very meager and unsatisfactory. The only witness as to this was the section foreman at that point, and we are convinced that, upon the issue as to whether the safety of its employees required the locality to be unfenced, the defendant failed to establish its defense, and the jury were warranted in finding against it upon that issue.

There remains then the question whether the public convenience excused the railroad company from inclosing its tracks at the point where the hogs came upon the right of way. They were killed close to the elevator on the south side of the track, and apparently had passed from the rye field directly north across the tracks to the vicinity of the elevator. If, as we now hold, the statute requires the complete inclosure of the track with fences and cattle-guards at points where the company is required to fence, then an inclosure of that portion of the grounds would exclude the public from the shipping and receiving facilities afforded by the elevator, coal house and corn-cribs, and thus largely deprive it of the benefits afforded by the railway station. This the company is not compelled to do, and hence was excused from inclosing its tracks at that point. The doctrine of the former opinion is sound in the main, but it failed to give due weight to the necessity of complete inclosure by fences and cattle-guards at points where a railroad company is required to fence. The conclusion reached and the fourth paragraph of the syllabus to the former opinion are therefore set aside, and the judgment of the district court is

REVERSED.

SEDGWICK, C. J., concurring.

Railroad companies are not required to fence their station grounds, if free access to the grounds by the public is necessary for the public convenience in transacting business with the road. When, for the convenience of the public, free access to the station grounds is necessary, the railroad company is not required to fence any part of such grounds, so as to exclude the public from access thereto at any point. If domestic animals running at large go upon such station grounds, and as a result of such trespass are injured by the ordinary operation of the road, the company is not liable for damages so occasioned. The company cannot extend such station grounds beyond reasonable requirements for the convenience of the public and the safety of the employees of the company. It must fence its right of way so far as it can do so without unreasonably limiting the area and extent of its station grounds. In this case the animals in question were trespassing upon the station grounds of the company, and while so trespassing were injured by the ordinary operation of the company's trains. The defendant therefore is not liable. The fact that the animals before going upon the station grounds may have crossed the right of way at a point where the same should have been fenced is immaterial.

For these reasons, I concur in the conclusion reached.

R. H. BENTLEY V. ESTATE OF MARY A. BENTLEY.

FILED DECEMBER 7, 1904. No. 13,656.

1. **Deposition: CROSS-EXAMINATION: WITNESS: COMPETENCY.** Where the testimony of a person having a direct legal interest in the result of an action where the adverse party is a representative of a deceased person is taken by deposition, and his testimony as to transactions with the deceased is objected to upon that ground, the adverse party may cross-examine. By so doing he does not waive his objections to the competency of the witness, but may urge the same at the trial. If the evidence in chief is admitted at the trial the cross-examination should also be

admitted; but, if the evidence in chief is excluded upon the objections of defendant as to competency, the cross-examination should also be excluded upon the defendant's objection, and the plaintiff is not entitled to use it to establish his case.

2. **Married Woman:** ACTION: EVIDENCE. In an action on account against a married woman, where the defendant pleads coverture, and the plaintiff in making his case discloses such fact to exist, he must prove, in order to recover, that the transaction upon which his action is based was had with reference to or with intent to bind her separate property, estate or business.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Talbot & Allen, for plaintiff in error.

Stewart & Munger, contra.

LETTON, C.

This is an error proceeding from the district court for Lancaster county disallowing plaintiff in error's claim against the estate of Mary A. Bentley, deceased. The claim was disallowed in the probate court, and upon appeal to the district court it was tried without a jury, and the plaintiff in error's cause of action dismissed. Mary A. Bentley died in May, 1901. In November, 1901, R. H. Bentley, plaintiff in error, filed a claim against her estate for $220 and interest. To establish the claim his deposition was taken before a notary public. Objection was made to his testimony upon direct examination on the ground that he was incompetent under section 329 of the code, the adverse party being the representative of a deceased person. At the conclusion of the direct examination, counsel for the defendant cross-examined the witness. Plaintiff in error contends that, though the court probably disregarded the testimony given by the plaintiff upon his direct examination, still it had no right to disregard his testimony given upon cross-examination, for the reason that by cross-examining the witness the defendant waived objections to the incompetency of the witness by reason

of his having a direct legal interest in the result of the controversy. At the trial the testimony given by the plaintiff in his examination in chief was admitted by the court over the objection of the defendant. The defendant objected to the admission of the cross-examination for the same reasons, the objection was overruled and the testimony admitted.

The claim consisted of a number of separate items of account, and there is no evidence except that of the plaintiff to show that these items were ever received and promised to be paid for by deceased. This court has repeatedly held that, upon the trial of an action at law to a court without the intervention of a jury, the court will be presumed to have considered only competent evidence, and that, if there is sufficient competent evidence to sustain the finding, it will not be disturbed. The district court evidently having this rule in mind overruled all objections, heard the testimony, and then disregarded all that was incompetent and all to which the witness was incompetent to testify. It is obvious that the plaintiff was entirely disqualified to testify with regard to his transaction with the deceased, and that all of his evidence as to this was clearly incompetent. The trial court would have erred if it had considered any of it, and it was rightly disregarded.

The argument of plaintiff in error that the defendant, by cross-examining the plaintiff, waived the objections to his incompetency, while perhaps available under certain circumstances in a case where the witness testified in open court, and the objections to his testimony in chief were ruled upon by a court having power to exclude or admit the same—which we do not decide—is not applicable where the testimony is taken by deposition, for the reason that the notary has no power to exclude testimony, but must receive all that is offered, noting the objections and exceptions of the parties, to be ruled upon at the trial. The only safe manner in which a defendant can proceed in such a case is to make his objection to each question on

the direct examination, and to cross-examine upon the theory that the direct examination may be admitted by the trial court. If the direct examination, however, is excluded at the trial upon his objections upon the ground that the witness is incompetent, the cross-examination falls with it for the same reason, if objected to, and the plaintiff is not entitled to use it independently. A different rule would be decidedly unfair, since a party might fail to cross-examine because he believed the trial court would exclude the examination in chief, while, if the trial court admitted it in evidence, he would be deprived of the benefit of cross-examination entirely. *Achilles v. Achilles*, 137 Ill. 589, 28 N. E. 45.

The defendant pleaded the coverture of Mary A. Bentley. The fact that she was a married woman at the time of the transaction was disclosed by the plaintiff, and no proof was made that the transaction was made with reference to her separate property, estate or business. This omission in itself was fatal to a recovery.

Considering only the competent evidence, there is not sufficient upon which to base a finding in favor of the plaintiff, and the judgment of the district court was the only one that could rightfully be rendered.

We recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHARLES B. WILSON V. ULYSSES TOWNSHIP OF BUTLER COUNTY, NEBRASKA.

FILED DECEMBER 7, 1904. No. 13,661.

1. **Highways: TOWNSHIPS: LIABILITY.** A township organized under the township organization act in this state is not liable to persons injured by reason of defects in the public highways within the limits of such township.
2. **Case Distinguished.** The second point in syllabus in the case of *Chicago, B. & Q. R. Co. v. Klein*, 52 Neb. 258, distinguished, in so far as it states unqualifiedly that such township is a "municipal corporation."

ERROR to the district court for Butler county: ARTHUR J. EVANS, JUDGE. *Affirmed.*

C. H. Aldrich and *L. B. Fuller*, for plaintiff in error.

Matt Miller, contra.

LETTON, C.

This action was brought against Ulysses township of Butler county, Nebraska, to recover damages for injuries sustained by the plaintiff in error, by reason of the defective condition of a highway within said township, which it is alleged it was the duty of the township as a municipal corporation to keep in repair. A general demurrer to the petition was sustained and the action dismissed. The question presented is whether or not a township in counties in this state under township organization is liable for injuries caused by defects in the public highways within such township.

The plaintiff in error bases his right to recover substantially upon three grounds: (1) That a township under the township organization act of 1895 is a complete corporate entity with plenary powers with respect to all of its duties and obligations; (2) that such a township

assents and voluntarily agrees to relieve and take upon itself certain duties and liabilities imposed by statute on counties; (3) that the liability with respect to special damages imposed upon counties is now transferred by virtue of the township organization act to the respective townships adopting the same. He contends that a township in this state is a complete municipal corporation; that, having voluntarily entered into certain obligations, having a charter for its existence in the constitution itself, and being by statute clothed with full authority to maintain a government for and by itself, in the same way and to the same extent as a village, the liability for negligence must follow; that there is a clear distinction between counties under the commissioner system and townships under the township system; that a county is a subdivision of the state itself, but that a township is a full and complete municipal corporation, having an independent corporate entity and a complete scheme of government, invested with exclusive control over the highways within its limits, and with authority to raise money and repair the same, and that hence at common law it is liable for failure to perform its duties, and for damages to individuals injured by such failure.

If, as is contended by the plaintiff, a township under our township organization act is a complete municipal corporation, and is to be considered in all respects the same as the ordinary municipal corporation, which usually consists of a town, village or city in the concrete sense of an aggregation of dwellings, or of persons living in more or less close proximity within a circumscribed area, the mere statement of the proposition would be the only thing necessary to establish the liability of the defendant in error. Ever since the opinion of Judge MAXWELL in *City of Omaha v. Olmstead*, 5 Neb. 446, it has been the settled law in this state that municipal corporations are liable for the failure upon the part of their officers to perform their duty in regard to maintaining the streets of the city in a reasonably safe condition. In that

case the leading English and American cases upon the subject were cited in the argument and in the opinion, and the doctrine laid down therein is in conformity with the holding of the great majority of the courts of this country.

Is a township a municipal corporation such as to make it liable for the negligence of its officers as to highways under the rule adopted in the state? The origin of the township in this country as a governmental unit, is to be found in the New England colonies. The statutory provisions in Massachusetts with respect to the powers, duties and liabilities of towns may be taken as typical of those usually enacted for the creation and government of such corporations. By the laws of Massachusetts townships are bodies corporate. They may in their corporate capacity sue and be sued in the name of the town. They may hold real and personal property for the use of the people of the town, and may hold property in trust for the support of schools. They may make all contracts necessary for the exercise of their corporate powers, and may sell and dispose of their corporate property. They may levy taxes for the support of schools, for the relief of the poor, for the construction and repair of highways, and for burial grounds, and may make by-laws for their general management and for preserving peace and good order. Town meetings are provided for at which town officers shall be elected, and the respective duties of these officers are specified in detail. The idea of the New England town was carried westward with the spread of population, and in nearly every western state the New England town meeting exists, either by itself as the only agency for general local administration outside of unincorporated villages and cities, or side by side with the system of county government by commissioners, which system has also spread westward from those colonies in which it first evolved upon this side of the Atlantic. For an interesting and instructive account of the history, modifications and practical operation of the township and county sys-

tems of local government in this country, see Bryce, American Commonwealth, chapter 48.

At a very early period in Massachusetts it was thought necessary to provide by statute that towns should be liable to actions for defects in the highways by persons who sustained special damage to their persons or their property by reason of such defects, and generally in the New England states to this day such liability is compelled by statute, so that but little light upon the question under consideration is to be found in these states, unless from the fact that, since statutes were enacted imposing such liability, the presumption may perhaps arise that, in the absence of such statute, no such liability was thought to accrue. In *Mower v. Leicester,* 9 Mass. 247, decided in 1812, it was held that a town was not liable in a common law action for damages sustained by an individual from a defect in the highways of the town. This case was based upon the doctrine of the English courts; the case of *Russell v. Men of the County of Devon,* 2 T. R. (Eng.) 667, being the leading case upon the subject. An interesting discussion of this subject is to be found in 1 Dillon, Municipal Corporations (4th ed.), secs. 961, 962, 963. A most thorough and exhaustive consideration of the whole subject, with the history of the various adjudications both in England and in this country, and a critical examination of nearly every case, is to be found in the learned opinion of Chief Justice Gray in *Hill v. City of Boston,* 122 Mass. 344, 23 Am. Rep. 332. Nothing that this court can say can equal this illuminating opinion in the light thrown upon the whole question. See also for the opinion of this court upon related subjects, *McConnell v. Dewey,* 5 Neb. 385, and *City of Omaha v. Olmstead, supra.*

Upon a comparison it will be seen that there is but little difference between the powers, duties and liabilities of a county in this state and those of a township. The object and purpose of their organization are the same, and the results sought to be accomplished are substantially alike,

except in degree and territorial extent of jurisdiction. The main point of distinction between the two systems is the more popular and democratic form of government allowed by the township; the idea of local self-government being the essence of the township system. *Van Horn v. State,* 46 Neb. 62. Counties are bodies politic and corporate. They may sue and be sued, plead and may be impleaded, and defend and be defended against, in courts having jurisdiction of the subject matter. They have power to purchase and hold the real and personal estate necessary for the use of the county, and may be the beneficiary of real estate conveyed to trustees, whether the real estate is situated in the same county or other counties of the state. They may sell, convey or lease any real or personal estate owned by the county. They may make contracts and do all other acts necessary to the exercise of their corporate powers. They may lay out, alter or discontinue roads, provide the necessary buildings, furniture and stationery for the use of the county officers. Townships also are bodies corporate. The law provides that each town shall have corporate capacity to exercise the powers granted thereto, or necessarily implied, and no others. It shall have power, first, to sue and be sued; second, to acquire property both real and personal for the use of its inhabitants, and to sell and convey the same, and to make such contracts as may be necessary in the exercise of the powers of the town; and the electors at the town meeting shall have power, among other things, to foster the planting of trees along the highways in such towns; to provide for public wells and regulate their use; to prevent nuisances; to make by-laws, to carry the powers of the township into effect; to raise money for constructing and repairing roads and bridges, for the prosecution or defense of suits by or against the town; and, in general have substantially the same powers for the same purposes as are authorized on the part of the county. A critical survey of these statutory powers granted to counties as corporate entities, and to townships as such, shows

clearly that the purpose of the township, as of the county, is to carry into effect with ease and facility certain powers and functions which are governmental in their nature, and which may be more readily and conveniently carried on by subdivision of the territory of the state into smaller areas. The powers with which they are entrusted are powers segregated and carved out from the mass of the sovereignty of the state. They are subdivisions of the state government upon which, for convenience, certain powers have been conferred, strictly limited, however, to the exercise of certain functions more easily carried out by subdivision.

A township partakes somewhat of a dual nature. In so far as its inhabitants exert the power of direct local self-government, they resemble municipal corporations acting under charters conferring such powers, but, in so far as the powers which the township exercises are limited and confined to those which properly belong to the government of the state as a whole, and which are merely devolved upon the township as a portion of the state government, they are mere local subdivisions of the state. Such organizations therefore are merely *quasi* corporations, not endowed with the full and plenary powers usually conferred either by charter or by general law upon municipal corporations proper, but only resembling the same in organization and functions. The assent of the inhabitants of each township to the provisions of the law is not required before the duties and liabilties imposed by the act are put in operation. It is a majority of the voters in the county which prescribes whether the township organization act shall apply within a given county or not. The inhabitants of a given township may be bitterly opposed to the township system of government, but they may be compelled against their will to be governed by this system.

"The reason which exempts these public bodies from liability to private actions, based upon neglect to perform a public duty, does not apply to villages, boroughs and cities, which accept special charters from the state. The

grant of the corporate franchise in those cases is usually made only at the request of the citizens to be incorporated, and it is justly assumed that it confers a valuable privilege, and which is held to be a consideration for the duties imposed by the charter. By those charters, larger powers of self-government are conferred than those confided to towns or counties; larger privileges in the acquisition and control of corporate property, and special authority is given them to make use of the public highways for the special and peculiar convenience of the citizens of the municipality in various modes not permissible elsewhere. These grants raise an implied promise on the part of the corporation to perform their corporate duties, and it inures to the benefit of every individual interested in its performance." *Town of Waltham v. Kamper*, 55 Ill. 346, 8 Am. Rep. 652.

Say the supreme court of the United States:

"And here a distinction is to be noted between the liability of a municipal corporation, made such by acceptance of a village or city charter, and the involuntary *quasi* corporations known as counties, towns, school districts, and especially the townships of New England. The liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation. 1 Dillon, Municipal Corporations (4th ed.), secs. 10, 11, 13; 2 Dillon, Municipal Corporations (4th ed.), sec. *761. The latter are auxiliaries to the state merely, and, when corporations, are of the very lowest grade, and invested with the smallest amount of power." *Barnes v. District of Columbia*, 91 U. S. 540.

In *Riddle v. Proprietors of Locks and Canals on Merrimack River*, 7 Mass. 169, it was said by Chief Justice Parsons:

"We distinguish between proper aggregate corporations, and the inhabitants of any district, who are by statute invested with particular powers without their consent. These are in the books sometimes called *quasi* corporations. Of this description are counties and hundreds, in

England; and counties, towns, etc., in this state. Although *quasi* corporations are liable to information or indictment, for a neglect of public duty imposed on them by law, yet it is settled, in the case of *Russell v. Men of the County of Devon,* 2 T. R. (Eng.) 667, that no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute."

The statement in the second part of the syllabus in *Chicago, B. & Q. R. Co. v. Klein,* 52 Neb. 258, that "a township in a county under township organization is an independent corporate entity—a municipal corporation—within the meaning of section 6, article IX of the constitution," is to be considered with reference to the matter actually in controversy in that case. In the body of the opinion it is said:

"In other words, a township in counties under township organization is an independent corporate entity, authorized by the constitution and vested by the legislature with power to assess taxes upon all the property therein for such purpose as the legislature has declared to be township purposes."

The question as to whether a township was a "municipal corporation" was not at issue in the case and was not considered. It is not stated in the body of the opinion that a township is a municipal corporation, and the clause injected in the syllabus was evidently done by inadvertence and is merely *obiter dictum.*

In this state the rule of the common law has been adopted, and counties being only *quasi* corporations are held not liable to parties injured by defects in highways. *Woods v. Colfax County,* 10 Neb. 552. By the enactment of the law of 1889, sections 114-118, chapter 78, Compiled Statutes, 1903 (Annotated Statutes, 6132-6136), which provides that, under certain circumstances and for a limited period after the injury is sustained, an action may be maintained against the county for such injury, the rule has been changed to a limited degree only, and, unless a party injured brings himself strictly within the letter

of the statute, the common law rule still applies. *Swaney v. Gage County,* 64 Neb. 627. The rule of the common law applies as well to townships; and there being no statute imposing such liability upon them this action cannot be maintained. We are aware that in a few states a different rule is applied as to the negligence of such *quasi* corporations, but we believe the one announced to be based upon the better reason and more in accord with the previous decisions of this court. If another rule is to be adopted in this state it must be done by legislation.

2. We think there is no force in the contention of the plaintiff in error that after the enactment of the township organization law the special statute just mentioned, which is applicable by its terms to counties only, became applicable to townships.

We recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in this opinion, the judgment of the district court is

AFFIRMED.

LOUIS F. WOODRUFF V. STATE OF NEBRASKA.

FILED DECEMBER 21, 1904. No. 13,659.

1. **Criminal Law:** LEADING QUESTIONS. A trial court in a criminal case has a large, though not unlimited, discretion in granting or refusing permission to ask a witness leading questions. The discretion is a legal one and subject to proper limitations.

1*a*. ———: ———. *Held*, in the case at bar, that no error was committed in allowing questions of a leading character to be asked, of which complaint is made.

2. **Rape:** EVIDENCE. In the prosecution of a charge for rape upon a female child under the age of consent, testimony of subsequent

acts of illicit intercourse, related in time to the offense charged, is admissible as corroborative evidence of the principal fact sought to be established.

2*a*. ———: ———. In proving the commission of the offense charged in such a case, it is not error to permit the prosecutrix to testify that, at the time of the commission of the offense, the accused promised to marry her if any trouble arose, even though such evidence may tend to prove the crime of seduction.

3. **Evidence** in such a case tending to prove that the prosecutrix became pregnant, and that a child was born as a result of the alleged illicit intercourse, is properly admissible.

4. **Conduct of Accused.** Any attempt to suppress evidence to stifle the prosecution and prevent a trial by flight beyond the jurisdiction of the court are circumstances from which unfavorable inferences may be drawn against the defendant in a criminal case. *Hubbard v. State*, 65 Neb. 805.

5. ———. In a prosecution for rape upon a female person under the age of consent, an attempt by the accused to have an abortion committed upon the prosecutrix is an inculpatory circumstance properly admissible in evidence and to be considered by the jury in determining the guilt of the accused of the offense charged.

6. **Evidence.** In a prosecution for carnally knowing and abusing a female child under the age of consent, where the previous chastity of the prosecutrix is in issue, it is not error to permit evidence tending to prove that, at the time of the commission of the offense, the prosecutrix was not aware that the accused was a married man.

6*a*. ———. Where the evidence on the part of the defense indisputably establishes the fact that, at the time of the commission of the alleged offense, the accused was a married man, evivence on the part of the prosecution tending to prove the same fact could, at most, be error without prejudice.

7. **Errors Reviewed.** Other alleged errors as to the admission and rejection of evidence examined, and *held* to be without merit.

8. **Trial:** CROSS-EXAMINATION. No error is found in the request of the court to counsel to desist from the further cross-examination of a witness along lines held by the court to be improper, nor in the manner of making the request.

9. **Previous Chastity:** EVIDENCE. In the prosecution of one charged with rape upon a female child under the age of consent where the issue of the previous chastity of the prosecutrix is involved, evidence of the general repute of the prosecutrix is not admissible

to prove prior unchastity. In such a case, chastity, as that term is used in the statute, means the character in reality for virtue possessed by the prosecutrix as distinguished from what it is reputed to be.

10. ———: ———. To prove the previous unchastity of a prosecutrix in a charge of statutory rape, it is not permissible to put in evidence the general reputation of one with whom she has associated, as to the latter being a person of unchaste character.

11. **Evidence**: REVIEW. The admission of evidence tending to prove that a third party, with whom the prosecutrix was alleged to have had illicit intercourse before the commission of the offense charged, was at the time of the trial out of the state and beyond the jurisdiction of the court, *held* not prejudicially erroneous.

12. **Testimony** in rebuttal, *held* properly admissible.

13. **Instruction**: REVIEW. An instruction limiting the evidence of subsequent acts of illicit intercourse to the sole purpose of corroborative evidence, *held* properly given.

14. ———: ———. The same rule applied to an instruction regarding evidence tending to prove that the accused endeavored to have an abortion committed upon the prosecutrix.

15. **Evidence** examined and found to be sufficient to sustain the verdict of guilty returned by the jury.

ERROR to the district court for York county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

France & France, for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown and *Mecker & Wray, contra.*

HOLCOMB, C. J.

On a trial to the court and a jury upon an information filed by the county attorney, the defendant was by the verdict of the jury found guilty of the crime charged; and, after the overruling of a motion for a new trial, he was by the court sentenced to imprisonment in the penitentiary for a period of four years. To secure a reversal of the judgment thus imposed, the defendant has prosecuted proceedings in error in this court. The charging part of the

information is that "said Louis F. Woodruff being then and there a male person over the age of 18 years, in and upon one Mabel Kerwood, a female child under the age of 18 years, to wit, between 15 and 16 years of age, and not previously unchaste, then and there being, feloniously did make and assault, and her, the said Mabel Kerwood, then and there wickedly, unlawfully and feloniously did carnally know and abuse. She, the said Mabel Kerwood, being then and there a female child between 15 and 16 years of age, as aforesaid, and not previously unchaste." Section 12 of the criminal code declares: "If any male person, of the age of 18 years or upwards, shall carnally know or abuse any female child under the age of 18 years, with her consent, unless such female child so known and abused is over 15 years of age and previously unchaste, every such person so offending shall be deemed guilty of a rape." The gravamen of the offense charged under the section defining the crime is the unlawful sexual intercourse by a male person over 18 years af age with a female child under the age of consent. In the case at bar, the prosecutrix being over 15 years of age, her alleged previous chastity was put in issue, and evidence was introduced for the purpose of showing she was previously unchaste, and as a complete defense to the crime charged. With these preliminary observations we proceed to a consideration of the more important of the alleged errors which are assigned and argued as grounds for a reversal of the judgment of conviction. The errors complained of are confined almost wholly to the rulings of the trial court on the admission and rejection of evidence and its instructions to the jury.

1. It is assigned as error that defendant's substantial rights were prejudiced because of the many leading questions permitted to be propounded to the prosecutrix over objections, and by that means eliciting answers favorable to the prosecution in support of the charge preferred. We find upon examining the record that many of the questions complained of as leading do not in fact suggest or lead to

the answer desired. While they may be answered by yes or no, they are not necessarily for that reason to be regarded as leading. Some are preliminary in their nature and as such, even though leading, are permissible. Others, after the prosecutrix had narrated all the facts in response to questions leading up to and including the commission of the crime charged, to the form of which we see no valid objections, were for the purpose of furnishing technical proof of the alleged unlawful act. Some of these questions which were permitted to be asked and answered may have been, and probably were, in a measure, of a leading character, but regarding which we are satisfied no abuse of discretion was committed by the trial court in suffering the examination to be pursued in the manner in which it was. It is, say all the authorities, discretionary with the trial court in both civil and criminal cases to allow leading questions on the direct examination; the discretion, of course, being a legal one and subject to proper limitations. Stephen, Digest of the Law of Evidence, 445, and note; McKelvey, Evidence, sec. 237, and notes. In *Edwards v. State*, 69 Neb. 386, it is held that the trial court has a large, though not unlimited, discretion in granting or refusing permission to ask a witness leading questions. In support of the rule there is cited in the opinion, *Schmelling v. State*, 57 Neb. 562, and *Welsh v. State*, 60 Neb. 101. We are satisfied that no serious error was committed by the trial court in respect of the matter complained of.

2. It is next contended that error prejudicial to the defendant was committed in permitting the prosecutrix to testify as she did to subsequent acts of illicit intercourse, which occurred at frequent intervals soon after the commission of the crime charged in the information. As we have noted, the essence of the offense is the unlawful sexual intercourse. The reason for the rule which should govern in respect to the admissibility of evidence to prove the charge ought not, it would seem, to be essentially different from evidence admissible to prove the crime of

adultery or seduction. In the case of *Way v. State,* 5 Neb. 283, it is held that, on a charge of adultery, evidence of improper familiarities between the parties, both anterior and subsequent to the time the offense is charged, may be received as corroborating proof, after evidence has been offered tending to prove the offense charged. In the opinion it is said:

"There is no doubt of the conflict of authorities upon the question, but upon an examination of it, we are of the opinion that the better rule in prosecutions for adultery is, to admit testimony of improper familiarities between the parties, occurring both before and after the time the act is charged, as corroborating evidence." Citing with approval, *Thayer v. Thayer,* 101 Mass. 111.

This rule has been held applicable to cases such as the one under consideration, in California, Iowa, Kansas, Kentucky, North Carolina, Tennessee, Washington and Wisconsin.

In *State v. King,* 117 Ia. 484, 91 N. W. 768, it is said:

"It may be, as contended by appellant, that in most of the cases the proof related to acts preceding the particular offense charged, but in view of the purpose of such testimony to show the relationship and familiarity of the parties, and to corroborate the prosecutrix, we discover no good reason why evidence of acts subsequent to that charged, if in some way connected with it, may not have as direct a bearing on those occurring before. The weight of authority authorizes similar proof in cases wherein adultery is charged, and, as evidence of other acts is received on precisely the same principle in causes of this character, there is no apparent ground for rejecting such evidence in the one class and receiving it in the other. The disposition toward each other might be quite as potential between parties when the female, though under 15 years of age, voluntarily yields her consent to the intercourse, as in the case of adultery; and we think evidence of repetition of the act so soon after the first offense rightfully admitted. Had the intercourse been against her consent, a different question would arise."

In *State v. Fetterly,* 33 Wash. 599, 74 Pac. 810, the court say:

"In principle there is no distinction, in this respect, between a prosecution where the charge is incest and a prosecution where the charge is rape upon a female child under the age of consent. The same reason that renders the testimony admissible in the one case renders it admissible in the other, and such is the effect of the authorities."

The Wisconsin supreme court say:

"Evidence should be excluded which tends only to the proof of collateral facts. It should be admitted if it has a natural tendency to establish the fact in controversy. Under this rule, in prosecutions for adultery, other adulterous acts between the parties than the one for which the accused is on trial, may properly be given in evidence upon the ground that they tend to corroborate the evidence as to the particular act of adultery charged. In this case (statutory rape) it cannot be doubted that the evidence, as regards other acts of intercourse between the accused and the girl, tended to corroborate her evidence as to the particular act alleged, the same as in a case of adulterous intercourse." *Lanphere v. State,* 114 Wis. 193, 89 N. W. 128. See, also, *People v. Edwards,* 73 Pac. (Cal.) 416; *State v. Robertson,* 121 N. Car. 551, 28 S. E. 59; *Smith v. Commonwealth,* 109 Ky. 685, 60 S. W. 531; *Sykes v. State,* 112 Tenn. 572, 82 S. W. 185; and *State v. Borchert,* 68 Kan. 360, 74 Pac. 1108.

We are satisfied that consistency and sound reason require the extension of the rule announced in *Way v. State, supra,* to a case like the one under consideration, and that the greater weight of authority, as well as the better reasoning, supports the rule. The fact, if it be one, that the evidence tends to prove another and independent crime does not necessarily determine its admissibility as evidence of the crime charged in the case at bar. The determinative question is, is it relevant and pertinent in establishing the offense charged, and does it throw some

light on that controversy and assist in the ascertainment of the truth in respect of such charge? We feel confident in the correctness of our position in saying that it does; and, if believed, the evidence is corroborative of the ultimate fact sought to be proved; that is, the act of sexual intercourse as charged in the information. It is also in this connection contended that the court erred in permitting the prosecutrix to testify that at the time of the commission of the alleged offense, and immediately before the act of sexual intercourse, the accused said he would marry the prosecutrix if he got her into any trouble. We see no error in the admission of this evidence. It was a part of the principal transaction—a part of the *res gestæ*. It was proper to show what induced the prosecutrix to submit herself to the embraces of the accused, whether this inducement was a promise to marry her and thus shield her from the consequences of wrongdoing, or was any other inducement or artifice resorted to in order to gain her consent. The fact that it may have tended to prove seduction is no objection to its admissibility. It is admissible in spite of such fact, and as a proper element of proof in support of the charge preferred against the accused. It is no objection to say the accused possibly, under other conditions and different circumstances, would be guilty of the commission of another crime than the one for which the prosecution was had. *Chapman v. State*, 61 Neb. 888.

3. An objection is offered because the trial court permitted the prosecutrix to testify that she became pregnant, and that a child was born as the result of the alleged illicit intercourse. Evidence of this character is proper and admissible. It indisputably established one element necessary to be proved by the state, that is, that sexual intercourse had taken place. It was proof of the *corpus* of the crime, as it were; that is, that the prosecutrix had sustained unlawful relations with some one was by this evidence placed beyond the pale of doubt. It is admissible on the same principle that an expert would be permitted to testify, after examination, that the girl had surren-

dered to some one her virginity. By this evidence the controversy was narrowed to the question of the defendant's relation to this positive evidence that a crime had been committed. The time during gestation, and of the birth of the child, was consistent with the theory of the prosecution as to the time of the commission of the act charged. The child was the legitimate fruit of the illicit sexual intercourse. In bastardy cases such facts are always admissible in evidence. *McNeal v. Hunter, ante,* p. 579, And the same rule is applicable to cases of seduction, which in principle is in many respects analogous to the crime of unlawful sexual intercourse with a female under the age of consent. In *State v. Fetterly,* 33 Wash. 599, 74 Pac. 810, it is held that, in a prosecution for rape on a female under the age of consent, testimony of a physician that prosecutrix, subsequently to the alleged rape, but within the period of gestation, had suffered a miscarriage, was competent both as evidence of the crime, and in corroboration of the prosecutrix's testimony that defendant was the guilty party. The admissibility of such evidence is recognized in *Lanphere v. State,* 114 Wis. 193, 89 N. W. 128, and *Knowles v. State,* 44 Tex. Cr. App. 322, 72 S. W. 398, on rehearing; although the latter case is cited as authority by counsel for plaintiff in error in support of his contention that such evidence was erroneously admitted.

4. The prosecutrix was permitted to testify as to statements in the nature of admission made by the accused with reference to attempts made by him to elude the officers of the law after he had learned that criminal proceedings were about to be instituted—such as leaving the state and going by an assumed name—and also attempts made by him to have the prosecutrix absent herself from court at times when the case was expected to be taken up for trial. Proof of all these facts and circumstances was clearly admissible as being inculpatory, and as having a tendency to fasten upon defendant guilt of the crime of which he was charged. The tendency of all such evidence and the inference proper to be drawn, if believed, were in-

consistent with the innocence of the accused, and had a legitimate bearing upon the question of fact put directly in issue by his plea of not guilty.

"An attempt to suppress evidence, to stifle the prosecution, and to prevent a trial by flight beyond the jurisdiction, are circumstances from which unfavorable inferences may be drawn against the defendant in a criminal case." So say this court in *Hubbard v. State*, 65 Neb. 805. See, also, *George v. State*, 61 Neb. 669; *Richards v. State*, 65 Neb. 808, and *Blair v. State*, 72 Neb. 501. The rules announced in these several authorities are quite applicable here and render all of the evidence of the nature referred to properly admissible.

5. Complaint is also made because the court admitted evidence tending to prove that when the prosecutrix became pregnant the defendant endeavored to have an abortion upon her committed. This evidence, if believed, shows a consciousness of guilt on the part of defendant and, upon principles above alluded to, is properly admissible. The fact that it tends to prove another independent crime does not for that reason alone render it incompetent. Its tendency is not only to corroborate the prosecutrix as to the principal fact alleged, but it is also in the nature of a tacit admission by the accused that he is responsible for her unhappy condition. It is an inculpatory circumstance proper to be considered by the jury in arriving at its verdict. We find no error in its admission.

6. Because the prosecutrix was permitted to testify that she was not aware the accused was a married man until after the time of the alleged offense, error is sought to be predicated on the admission of such evidence. We perceive no error in its admission. It is true that question does not affect the guilt or innocence of the accused, but the relations between the prosecutrix and the accused were a material subject of inquiry. The question of her chastity was involved in the issues raised in the case. Whether she was receiving the attentions and embraces of

an unmarried man who she might reasonably expect would shield her from the consequences of their illicit intercourse, or of a married man from whom no such protection could be expected, was a circumstance proper to be considered, and, for such reason, the evidence was not erroneously admitted. It is quite probable that the jury would have felt less confident of the previous chastity of the prosecutrix had they believed she yielded to the accused, knowing he was a married man, than would have been the case if she believed him unmarried. Again, by the accused's own testimony it became an established and indisputable fact that he was a married man at the time of the commission of the alleged offense, so that the admission of any evidence by the prosecution establishing the same fact could at most be only error without prejudice.

7. The course of the examination and cross-examination of the different witnesses for the prosecution and for the defense and the evidence admitted and rejected are in many respects objected to, exceptions properly taken, and regarding the rulings thereon alleged errors are assigned. An examination of these different assignments of error does not impress us as being meritorious or as calling for a reversal of the judgment, and a discussion of the same in detail would serve no useful purpose.

8. Some exceptions are taken to remarks of the trial court during the progress of the trial, which upon examination are not regarded as being especially ill-timed or prejudicial to the rights of the defendant or as unwarrantably restrictive to counsel in the conduct of the defense. Counsel sometimes in their earnestness and zeal in the cause of their clients go so far as to render it appropriate to invoke the restraining influence of the trial court, and in this instance we see nothing more than a courteous request to counsel to desist from the further cross-examination of a witness along lines held by the court to be improper.

9. On the issue of the question relating to the previous

chastity of the prosecutrix, evidence of specific acts tending to prove that she was unchaste prior to the time of the alleged offense was offered and admitted, and it was also sought by the defense to show by evidence that her reputation for virtue and chastity in the community where she resided before the commission of the alleged offense was bad; and, because the court excluded evidence of general repute regarding the question of chastity, it is earnestly contended that grievous error was committed for which the judgment should be reversed and a new trial awarded. The statute, as has been noted, provides that, if a female child is over 15 years of age and is previously unchaste, this fact if established by the evidence would be a bar to the prosecution and would be a complete defense; and the state being required to prove its case beyond reasonable doubt, if by the evidence such doubt was raised in the mind of the jury as to the previous chastity of the prosecutrix, as alleged in the information, the accused would be entitled to an acquittal. The statute does not in words speak of the character of the prosecutrix for chastity. It declares only that the crime shall be deemed to have been committed if under the age of consent, unless the female known and abused is over 15 years of age and previously unchaste. Under a statute so worded, is evidence of the reputation of a prosecutrix for chastity admissible, or must the defense of prior unchastity be established only by evidence tending to prove an actual unchaste character, as distinguished from what it is reputed to be? Character, it is said, is "the peculiar qualities impressed by nature or habit on a person, which distinguishes him from others"; or, as is defined by some, a reputation or estimation in the community in which one is held. 6 Cyc. 892; *Bernecker v. State*, 40 Neb. 810. It is observed by the author of the text above referred to that doubtless there is a distinction observed by careful writers between character and reputation. Character, where the distinction is observed, signifies the reality, and reputation merely what is reputed or understood from report to be

the reality, about a person or thing. 6 Cyc. 892. Chastity is defined to be "that virtue which prevents the unlawful commerce of the sexes." 6 Cyc. 978. In *Bailey v. State*, 57 Neb. 706, in which a construction of the language of the statute in respect of the particular question now under consideration was involved, it is held:

"A woman not 'previously unchaste' within the meaning of section 12, chapter 4 of the criminal code, is one who has never had unlawful sexual intercourse with a male prior to the intercourse with which the prisoner stands indicted."

These definitions and the holding in the case just cited unmistakably, we think, point to the conclusion that the fact in controversy is the previous chastity, or want thereof, of the prosecutrix, that is, the real character in its technical and stricter sense as distinguished from her reputed character; and that the evidence to establish such, when in controversy, at least to overcome the allegation of chastity, must be directed not to reputation, but to facts and circumstances of individual acts and conduct tending to prove a lack of that virtue in reality possessed by the female, which it is the object of the statute to protect. In a seduction case prosecuted criminally, *Powell v. State*, 20 So. (Miss.) 4, and which is analogous in many respects to a case like the one at bar, it is held that it is sufficient if a girl had never had sexual intercourse, although her reputation might be bad. Say the court:

"So long as a girl remains personally pure, so long as she is free from the pollution of criminal sexual intercourse, so long is she entitled to the protection of the law. * * * She may shock with the indiscretion of her speech and the freedom of her manners, and yet never have had a thought of parting with virtue, and, until she does part with her virtue, she is regarded by the law as of chaste character." See, also, *Mills v. Commonwealth*, 93 Va. 815; *People v. Kehoe*, 123 Cal. 224; *State v. Brinkhaus*, 34 Minn. 285; *O'Neill v. State*, 85 Ga. 383.

In *Kenyon v. People*, 26 N. Y. 203, under a seduction

statute, evidence of general reputation of a female for want of chastity is held inadmissible; the words of the statute being "previous chaste character." The words "chaste character" are held to mean actual personal virtue and not reputation, and require evidence of specific acts of lewdness for impeachment. To the same effect is *People v. Nelson,* 153 N. Y. 90.

In *State v. Prizer,* 49 Ia. 531, where a statute provides for the punishment for the seduction of any unmarried woman of previous chaste character, it is held that "character" refers to moral qualities and not to reputation, and that evidence of reputation was not admissible upon the issue of character, but only to impeach or corroborate testimony regarding particular acts of unchastity. In the opinion it is said:

"Such a character may be established by proof of particular acts, or by a course of life and conduct inconsistent with purity. A pure character may not be shown by reputation, but evidence of particular lewd conduct may be rebutted by proof of a good reputation. It will be observed that in no case can reputation be given in evidence to establish the chastity or the impurity of the woman. A good reputation being shown by the prosecutrix in rebuttal of specific charges of lewdness, the state, of course, may introduce evidence upon that issue, and assail the woman's reputation in contradiction of the evidence she has offered upon that point. It will thus be seen that evidence of reputation is not admissible upon the issue involving the woman's character, but only to discredit or support testimony tending to establish particular acts of lewdness."

The rule as stated in the authority last cited impresses us as being both reasonable and sensible, and one well calculated to subserve the interests of justice and to protect the rights of the accused. A very interesting monographic note relating to the admissibility of such evidence will be found in connection with the case of *Bradshaw v. Jones,* 103 Tenn. 331, 76 Am. St. Rep., 655. Upon both

principle and precedent, we are satisfied that the proposed evidence as offered was inadmissible, and that no error was committed in its exclusion.

10. Evidence was also offered and excluded, the purpose of which was to prove that the reputation of a girl associate of the prosecutrix for chastity was bad, and error is sought to be predicated on the ruling excluding such evidence. We are of the opinion that the court ruled correctly. While the facts regarding the conduct, action and associates of the prosecutrix which throw any light upon the question of her previous chastity, and whether she was in the habit of associating with persons of lewd and unchaste character, are proper to be offered in evidence, we do not think the rule does or ought to extend so far as to permit an issue to be raised as to the general repute for chastity of some third party with whom the prosecutrix may have associated, any more than it should be extended to her own reputed lack of virtue. While the question of her previous chastity need not be proved by direct evidence, but circumstances may be relied on to establish the fact, yet such facts and circumstances as come within the knowledge of the witnesses testifying, as distinguished from repute, embrace the limit of the admissibility of the evidence going to establish such fact.

11. It developed in the trial of the case on the issue of the previous chastity of the prosecutrix that a third party was charged with having sustained illicit relations with her before the time of the alleged offense committed by the accused, and the state was permitted to show that such third party was at the time of the trial in another state and consequently out of the jurisdiction of the court. The admission of this evidence is assigned as prejudicial error. We do not so regard it. The evidence was as favorable to the accused as to the state. It served no other purpose than to show that such party was out of the jurisdiction of the court, and to prevent any possible speculation on the part of the jury as to why his testimony was not introduced before them.

12. Some exceptions are taken as to the manner of admitting testimony in rebuttal, but upon examination we find no error in this respect. The prosecutrix, while testifying generally when first on the stand that she had been virtuous prior to the commission of the act complained of, was permitted on rebuttal to deny specific acts testified to in behalf of the defense tending to prove her unchaste. Such rebuttal testimony was not erroneously admitted.

13. An instruction is excepted to which in effect limits the testimony of subsequent acts of illicit intercourse to the sole purpose of corroborative evidence. The evidence having been properly admitted, for the reason heretofore given, it follows that the instruction in harmony with the rule governing its admissibility is without error.

14. An instruction limiting the testimony tending to prove that the accused had endeavored to have an abortion produced on the prosecutrix, solely as corroborative evidence, is also excepted to. For like reasons, this instruction was proper.

15. It is contended that the verdict is not supported by sufficient evidence. No useful purpose would be subserved in stating the evidence in detail, nor yet the substance of it only. There are in evidence many facts and circumstances of a corroborative character which materially strengthen the evidence of the prosecutrix as to the principal fact about which she testifies. The examination we have given the case as disclosed by the record convinces us that the evidence is ample to sustain the verdict, and that the controversy of fact was peculiarly one for the jury to determine, and that its determination cannot with propriety be overturned on the ground of lack of evidence to support the finding.

Finding no error in the record prejudicial to the substantial rights of the accused, we reach the conclusion that the judgment ought to be in all things affirmed, which is accordingly ordered.

AFFIRMED.

JOSEPH F. PARKINS V. MISSOURI PACIFIC RAILWAY COMPANY.

FILED DECEMBER 21, 1904. No. 12,431.

Instructions must be consistent with each other, and if upon a fair construction of all the instructions given in a case they require that the plaintiff prove substantive facts that are not necessary to a recovery, such instructions are erroneous.

ERROR to the district court for Sarpy county: WILLARD W. SLABAUGH, JUDGE. *Judgment of reversal adhered to:*

F. T. Ransom and *Weaver & Giller,* for plaintiff in error.

John F. Stout, James W. Orr and *B. P. Waggener, contra.*

SEDGWICK, J.

In the opinion of Mr. Commissioner HASTINGS, 4 Neb. (Unof.) 13, the conclusions reached in the former opinion are discussed and, with one exception, are approved. The commissioner concluded that instruction numbered five, given by the court upon its own motion, was erroneous and required a reversal of the judgment below. In the argument before the court, this conclusion of the commissioner was mainly the subject of discussion. We have, however, reviewed the briefs and record, and have no doubt in regard to the correctness of the conclusions reached in the first opinion, 4 Neb. (Unof.) 1, unless it be with respect to the matter pointed out by Mr. Commissioner HASTINGS. The objection made to the 5th instruction is that it required the plaintiff to prove not only that the gravel in question was not refused by the defendant because it was unsuitable, in the judgment of its superintendent, for ballasting its railway, but also that "the ballast furnished under such contract was suitable for such purposes." In the next prior instruction the jury were told:

"If you believe from the evidence that the gravel which was delivered to the defendant was, in the judgment of the superintendent of the railway company, not suitable for ballasting purposes as provided in the contract, and that the superintendent refused to take any more for such reason, and that the plaintiff was prior to October 5, 1895, so notified, then you should find for the defendant."

So that by the 4th instruction the jury were told under what circumstances their verdict should be for the defendant, and by the 5th instruction the circumstances are stated under which the verdict may be for the plaintiff. By these two instructions, taken together, the jury must have understood that, unless the plaintiff proved that the gravel furnished by him under the contract was suitable for ballasting for the defendant's railway, he could not recover. The question is whether this is a correct statement of the law.

There was evidence that the plaintiff urged the company to accept the gravel; and that the company, by its officers and agents, other than the superintendent, in answer to these requests, gave various reasons for not accepting the gravel at that time, but made no objection to the gravel as unsuitable for ballasting purposes. The defendant insists that, as these letters were not written by the superintendent, upon whose knowledge and opinion as to the quality of the gravel the matter depended, this evidence is of no importance. It is not, however, contended that these letters were incompetent as evidence; and, having been properly received, their weight and bearing upon the question at issue was a matter for the jury to determine. The testimony of the plaintiff himself that no objection was made to the quality of the gravel, and that the refusal to receive it was placed upon other grounds, although coming from a witness highly interested in the event of the suit, is so far corroborated by the evidence referred to, and other evidence in the record, as to require this question to be fairly submitted to the jury.

The trial court in another instruction told the jury

plainly that, if the gravel offered was, in the judgment of the defendant's superintendent, unfit or unsuitable for ballasting defendant's railway, then the defendant had the right to refuse to accept the same; and again in the 2d instruction:

"The defendant must prove that he objected and refused to take the gravel as and for the reason he alleges, and so notified the plaintiff prior to October 5, 1895." If this instruction is correct, then, if the defendant did not prove this, that is, if the evidence taken altogether did not show it, the plaintiff would be entitled to recover, and it would be wholly unnecessary for the plaintiff in addition to this fact to also prove that the gravel was, in fact, suitable for ballasting the defendant's railway. The defendant, of course, could not, during all the time the question of receiving the gravel was pending, lead the plaintiff to believe that, in the judgment of the superintendent, the gravel was suitable by raising other objections and giving other reasons for not receiving it, and, not having at any time notified the plaintiff that the gravel was unsuitable, defend upon that ground when sued. This would be the rule even though the fact were that the gravel was unsuitable for the uses for which the defendant desired it. If the jury were satisfied from the evidence that the defendant had not refused or objected to receive the gravel on the ground that it was unsuitable, in the judgment of its superintendent, the verdict should have been for the plaintiff. If it was established that the defendant had objected and refused to receive the gravel because, in the judgment of its superintendent, it was unsuitable, then the question might be whether this judgment of the superintendent was reasonable and based upon sufficient grounds; and upon that question it would be competent to show what the fact was in regard to the quality of the gravel and its suitableness for the purposes for which the defendant intended it.

We think that the reasoning of Mr. Commissioner HASTINGS upon this point is sound, and the conclusion

that instruction number five is erroneous is right. The judgment of reversal is therefore adhered to.

REVERSED.

BARNES, J., dissenting.

I am unable to concur in the foregoing opinion, for the following reasons:

When this case was before us the first time we affirmed the judgment of the trial court, 4 Neb. (Unof.) 1. Our second opinion, written by Mr. Commissioner HASTINGS, reverses the judgment of that court, 4 Neb. (Unof.) 13, and the majority now adhere to that opinion on the same ground and for the same reason set forth therein, to wit: that the court erred in giving instruction No. 5, because it required the plaintiff to prove more than was necessary to entitle him to recover. The pleadings are fairly set forth, in substance, in our first opinion, and no fault is found with, or criticisms passed upon, the facts or issues as stated therein; therefore, no further statement of the case will be made in this dissenting opinion. It is sufficient to say that the petition set forth the contract; alleged the breach of it by the defendant; stated that the plaintiff was at all times ready and willing to perform his part thereof; set forth the amount of his damages, and prayed for a judgment therefor.

The answer admitted the making of the contract, and the plaintiff's part performance; admitted that defendant refused to receive any more gravel thereunder; and affirmatively alleged as a reason for its refusal and as a defense to the plaintiff's petition that the gravel furnished by him was, in the judgment of the defendant's superintendent, unfit and unsuitable for ballasting purposes, and was, in fact, unfit therefor; that the defendant, during the life of the contract, notified the plaintiff of that fact, and thus terminated it according to its terms. The plaintiff by his reply alleged affirmatively that the gravel was, in fact, and in the judgment of the defendant's superintendent, fit and

suitable for ballasting purposes; that it was the kind of gravel contracted for; that the defendant had received 21,816 cubic yards thereof, as stated in the petition, and had used the same for ballasting its roadbed, and that the defendant, without reason, arbitrarily refused to receive the balance of the gravel contracted for by the agreement in question, after the expiration of the contract, for the purpose of avoiding and escaping its liability under said contract. The formal denials contained in the reply were rendered nugatory by these averments, because this new matter was inconsistent with such denials. This rule of construction is the one which should be applied to the reply, for it accords with the rule adopted by all of the courts in this country. In *State v. Hill*, 47 Neb. 456, it was held:

"Where the petition alleges the delivery of the official bond declared on, the allegations in the answer of a surety—following an averment therein that he signed upon condition the principal should also sign—that 'if it (the bond) was ever delivered, it was done in violation of the express condition aforesaid upon which the defendant signed said instrument,' must be treated as a substantial admission of the delivery of the bond."

When the plaintiff alleged in his reply that the gravel in question was suitable, in fact, and in the judgment of the defendant's superintendent, for ballasting purposes, and that the defendant, acting without reason and arbitrarily, and for the purpose of avoiding and escaping its liability under the contract, refused to receive the balance of the gravel contracted for, he clearly admitted the allegations of the defendant's answer as to notice and the termination of the contract, and assumed the burden of proving affirmatively that the gravel in question was, in fact, and in the judgment of the defendant's superintendent, suitable for ballasting purposes; that the defendant's refusal to receive it was arbitrary, and made for the sole purpose of avoiding its liability under the contract. That this was the legal effect of the plaintiff's reply seems be-

yond question. *Ketelman v. Chicago Brush Co.*, 65 Neb. 429; *Dinsmore & Co. v. Stimbert*, 12 Neb. 433; *Home Fire Ins. Co. v. Johansen*, 59 Neb. 349; *Johnson v. Hesser*, 61 Neb. 631. It is unnecessary to cite further authority to support this well settled rule.

The plaintiff, having by his own pleadings assumed the burden of proof as to the matters above stated, introduced no evidence whatever in support of the allegations contained in his reply; while the defendant's superintendent testified that in his judgment, and in fact, the gravel was unsuitable for ballasting defendant's road; that under his orders notice of that fact was given to the plaintiff, as soon as it was possible to determine it, and the contract was thus terminated before its expiration. The plaintiff not only failed to controvert this evidence, but tacitly admitted that numerous conversations had occurred between himself and the defendant's superintendent about the quality of the gravel; that the question was discussed between them of how to treat it, and what, if anything, they could put with it to render it suitable for the defendant's use. Under the pleadings it would have been proper for the court to have instructed the jury that the burden of proof was on the plaintiff to show that the gravel in question was, in fact, and in the judgment of the defendant's superintendent, fit for its use; and that the defendant's refusal to take the same was arbitrary and unwarranted by the facts. And yet, by the instruction complained of, the jury were told generally that if they found these facts affirmatively the plaintiff would be entitled to recover. The instruction was general in its terms, and applied to the defendant's evidence as well as that of the plaintiff. The jury must have understood that it applied to all of the evidence in the case. It fairly covered the issues presented, and in such a way that the plaintiff had no right to complain of its effect. In fact it was much more favorable to him than to the defendant. It thus seems clear that my associates have failed to properly analyze the pleadings, and are mistaken as to the

real issues presented by them. It is conceded that the plaintiff was bound to show that the action of the defendant's superintendent was arbitrary and unwarranted. The only way he could do this was to prove that the gravel in question was in fact suitable for the defendant's use, and was such as was contemplated by the contract. For these reasons, it is apparent that the court did not err in giving the instruction complained of. Again, it seems clear from the record that under the pleadings and the evidence, as contained therein, a judgment for the defendant is the only one that could have properly been rendered. For this reason, if for no other, the instruction did not prejudice the plaintiff's rights.

For the foregoing reasons, it seems to me that our second opinion should be set aside; that our first opinion should be adhered to, and the judgment of the district court affirmed.

STATE OF NEBRASKA, EX REL. WILLIAM J. ELLINGSWORTH, RELATOR, V. ALFRED G. CARLSON ET AL., RESPONDENTS.

FILED DECEMBER 21, 1904. No. 13,851.

1. **Injunction: JURISDICTION.** An injunction order made by a court which has no jurisdiction over the matter involved, or which is in excess of the powers of the court granting it, is void.

2. **Election Board: DUTIES.** The duty of an election board to canvass the votes cast at the election is a political duty plainly prescribed by a positive statute, and cannot be enjoined by the courts.

3. **Mandamus: DEFENSE.** It is not a defense to an application for a writ of mandamus that the action which it is sought to compel has been enjoined, if it appears conclusively from the record, or from the conceded fact in the case, that the court which issued the injunction order had no power to enjoin the act in question.

4. **Costs.** When public officers refuse to perform a statutory duty and are compelled to do so by mandamus, the costs of the mandamus proceedings will be adjudged against them when the relator is

himself without fault, notwithstanding that the officers were acting in obedience to an injunction order, supposed by them to be valid, but which was in fact void for want of power of the court issuing it over the subject matter.

ORIGINAL application for a writ of mandamus to compel respondents to canvass the votes for village trustees. *Writ allowed.*

Thomas Darnall, *E. A. Cook* and *W. D. Giffin*, for relator.

E. C. Calkins and *H. V. Calkins*, *contra*.

SEDGWICK, J.

In April, 1904, there was held in the village of Gothenburg an election of members of the board of trustees of the village. At the close of the election, and before the votes had been canvassed, one John Strahle, alleging that he was an elector of the village of Gothenburg, began a proceeding in the county court of Dawson county to contest the election of Carroll, Weideranders and Ellingsworth, three of the candidates at said election, each of whom had received, it is conceded, a majority of the votes cast at the election for the office of trustee. On the same day that he commenced this contest in the county court, the said Strahle began an action in the district court for Dawson county for the purpose of enjoining the board of trustees of the village of Gothenburg from canvassing the votes cast at the election, and in that action he obtained from the county judge of Dawson county a temporary order of injunction restraining the board of trustees from canvassing the vote. Afterwards, his contest proceedings having been tried in the county court, and having resulted against him, and having been taken to the district court, both actions were tried in the district court, and determined against the contestant Strahle. He has brought both actions to this court for review. The district court, having upon the final hearing dissolved the temporary injunction restraining the board from canvassing the votes,

fixed the amount of the supersedeas bond to be given by the plaintiff therein to supersede the judgment of the district court during the pendency of the action in this court, which bond was given by the plaintiff and duly approved, and the cause is now pending in this court. Thereupon this action was brought to obtain a writ of mandamus to compel the village board to proceed and canvass the vote notwithstanding the injunction. The parties have stipulated the facts upon the record, and the question is whether the injunction was effectual to prevent the canvassing of the votes.

In *Calvert v. State,* 34 Neb. 616, the plaintiff in error had been adjudged guilty of contempt in violating an injunction order of the district court, and in reversing that judgment the court by MAXWELL, C. J., said:

"The question presented to this court is the power of a judge at chambers, upon the issues presented, there being disputed questions of fact, to make the order in question. In any case where the court or judge has jurisdiction and grants an injunction during the pendency of a suit, the injunction while in force must be obeyed. A court should exercise great care in granting such relief, and only where it is clear the injury to the plaintiff will be great or irreparable; but having granted it the adverse party should move to dissolve or modify and cannot disregard it with impunity. A court must insist that its legitimate orders be obeyed. This is necessary both for the protection of private rights and those of the public. If the court or judge exceeds his jurisdiction, however, his action in the premises is like that of any other person who acts without authority. * * * Suppose the owner of a farm, or one or more city lots, should apply for an injunction to restrain the construction of a railway across his land, and should set forth the same facts as to his ownership and possession as the defendant has done in this case, and the railway company should allege the same facts as are stated in the plaintiff's petition, would the court or judge on a preliminary hearing have authority to tie the hands

of the landowner and permit the adverse party to divest him of his rights and destroy his possession? The statement of the case carries with it a full answer. The judge, in effect, has undertaken to dispose of the merits of the case without a hearing. A temporary injunction merely prevents action until a hearing can be had. If it goes further, and divests a party of his possession or rights in the property, it is simply void. *People v. Simonson*, 10 Mich. 335; *Port Huron & G. R. Co. v. Judge*, 31 Mich. 456; *Salling v. Johnson*, 25 Mich. 489; *McCombs v. Merryhew*, 40 Mich. 72; *Arnold v. Bright*, 41 Mich. 207; *Tawas & B. C. R. Co. v. Judge*, 44 Mich. 479, 7 N. W. 65. Judge Cooley, in *Arnold v. Bright, supra*, says: 'The court of chancery has no more power than any other to condemn a man unheard, and to dispossess him of property *prima facie* his, and hand over its enjoyment to another on an *ex parte* claim to it. In several cases it has been decided that possession of lands is not to be disturbed by means of a preliminary injunction. *Hemingway v. Preston*, Walk. Ch. (Mich.) 528; *People v. Simonson*, 10 Mich. 335.'"

It is said by Mr. High in his work on Injunctions, vol. 2 (4th ed.), sec. 1425:

"While it is thus seen that courts of equity exact the most implicit obedience to the writ of injunction, and treat its wilful violation as a most flagrant contempt of court, the doctrine is to be understood with the qualification that the court has jurisdiction over the subject matter in controversy. And if the court has no jurisdiction over the matter involved, or if it has exceeded its powers by granting an injunction in a matter beyond its jurisdiction, its injunction will be treated as absolutely void, and defendants cannot, in such case, be punished for contempt for its alleged violation. For example, when an injunction is issued against a board of township officers to restrain them from holding an election which they are authorized by law to hold, equity having no jurisdiction to interfere in such case, there can be no disobedience of the injunction and no attachment for contempt, since the

mandate of the court is absolutely void. So where a court has exceeded its powers by granting an injunction in a matter over which it has no jurisdiction, as by enjoining a board of municipal officers from canvassing the returns of an election, the court having no power to hear or determine such controversies, its injunction will be treated as absolutely void, and a punishment inflicted for its violation will not be upheld."

One of the cases referred to by Mr. High in support of this doctrine is *Dickey v. Reed*, 78 Ill. 261. In that action an injunction had been granted restraining the common council of the city of Chicago from canvassing the returns made to them by the judges and clerks of election. The defendants were advised by their counsel that the injunction was void, and that they might safely disregard it. The council then proceeded to canvass the returns. They were cited for contempt by the circuit court from which the injunction had issued, and upon judgment being entered punishing them for such contempt they appealed to the supreme court. In the opinion it is said:

"Public policy does not require such a jurisdiction, even if it could sanction it. If the power were admitted, where would its jurisdiction end? Suppose a person were to conceive a law to have been unconstitutionally enacted, could he, by bill, restrain the governor and all other officers from executing it until a hearing could be had and the law declared valid? Suppose a citizen, in his hostile opposition to a governor elect, or from other motives, were to conceive that he had obtained his apparent majority by fraud, could he apply to a court for and obtain an injunction to restrain him from becoming inaugurated, until by delays and appeals, the term for which he had been elected should expire, and thus defeat the will of the people? * * * In this case there was a complainant, who had exhibited a bill, and there was a subject matter for litigation, and the controlling question is, whether the court, under any circumstances, could have power to hear, determine and decree in reference to it. If not, then the

whole proceeding was *coram non judice*. The law under which this election was held, neither in terms nor by implication confers the power. Nor is it asserted that the court had facts before it which required it to take judicial cognizance, and hear, adjudicate and decree. On the contrary, the court refused to continue the injunction, thus virtually deciding that the court was powerless to afford the relief sought, and thereby permitting the injunction to come to an end by the terms of the order awarding it, and we are clearly of opinion that it was not a case for equitable interposition. * * * In *Walton v. Develing*, 61 Ill. 201, it was held, where an injunction was issued to restrain officers from holding an election, and it was disobeyed, that they were not amenable to the process or liable to be punished for a contempt in disobeying the writ. And it was upon the grounds that the writ was void for the want of power, and the law required the officer to perform this particular duty. The distinction was there taken that, where the court has power over the subject matter, and authority to take such jurisdiction, and the court acts, its process must be obeyed; but where the power is wholly wanting, then the process is void, and need not be obeyed. The same rule was recognized and applied in *Darst v. People*, 62 Ill. 306. So the doctrine is by no means novel in this court."

In *State v. Gibbs*, 13 Fla. 55, 7 Am. Rep. 233, the court said:

"It is insisted by the relator that the proceedings by the canvassers were illegal and void, because they were enjoined by the order of a judge of the circuit court from further proceeding until the further order of the circuit judge; and that the respondents did proceed to declare the partial result of the election, of which the relator complains, before the dissolution of the injunctional order and without a further order of the judge. We think the order of the circuit judge was unadvisedly made, and that in its form and effect it was essentially a perpetual injunction. It forbade the further proceeding until permis-

sion should be granted by the judge, and was in effect the abrogation of a statute which authorized and required them to proceed with reasonable dispatch, and it was therefore illegal."

Scott v. McGuire, 15 Neb. 303, was an action to enjoin the county commissioners "'from removing the county seat * * * or any of the county offices or county records or papers' from the town of La Porte to the town of Wayne." An election had been held upon the question of removing the county seat, and it appeared in the case inferentially that the result was in favor of Wayne. The opinion, after stating that the object of a contest of election is to have the declared result of the election vacated, says:

"This, however, cannot be reached by an order of injunction restraining county officers from removing their offices to the relocated county seat, and transacting business there, but by a judgment formally setting aside the result arrived at and declared by the canvassers of the votes cast at the election, in an action brought to contest it. Such an injunction would compel a violation by these officers of a positive command of the statute * * * that on the relocation of the county seat, they 'forthwith remove their respective offices, and all county records, papers, and property in their offices or charge to the place where said county seat shall have been relocated,' a severe penalty being provided in case of a refusal to do so. This is a valid enactment which the courts have no right to disregard by requiring others to disobey it."

And so the statute provides that immediately after the election the board shall canvass the votes, and that a contest may be begun after (not before) the canvass is made. The injunction in this case attempted to prevent this canvass of the votes. There can be no circumstances under our statute which will authorize the courts to so interfere and stop the election board from performing this plain statutory political duty. It follows that the injunction order made by the district court was absolutely void

and should have been disregarded by the canvassing board. As all of the facts are agreed upon by the parties and the relator is plainly entitled to the relief asked, a peremptory writ will be ordered upon the application filed.

2. It is alleged in the answer herein that the respondents are not interested in the result of this litigation, and that they are ready to perform their duty whenever it is made plain to them by the proper authorities, and they therefore ask that no costs be taxed against them in this case. The party who obtained the injunction order is not a party to this proceeding and costs cannot therefore be adjudged against him herein. There is but very little in the record bearing upon the question of the good faith of the respondents. It is conceded in the stipulations, that is, it is alleged in the affidavit of the relator, and admitted by the respondents, that "the majority of said trustees, said A. G. Carlson, F. E. Carlson and Habbe Janssen, refuse to canvass said vote." Upon this evidence we think the costs in this case must be adjudged against these parties.

It was said by the supreme court of Illinois in *Dickey v. Reed*, *supra*:

"It is true that officers and others may be embarrassed as to their course of action in such cases. They must act at their peril under all such circumstances. They can, as the parties did in this case, call to their aid able counsel, learn their duty from all available sources, and then act and abide the consequences. If the advice they procure be wrong, it will be their misfortune, and the incorrect advice will not excuse the offense or mitigate the punishment."

It does not appear that these respondents took the advice of counsel with special reference to their disinterested duty in the matter. The relator herein is at least equally innocent with themselves, and the ordinary rule for taxing costs must be applied. The costs of these proceedings therefore will be taxed against the respondents A. G. Carlson, F. E. Carlson and Habbe Janssen.

WRIT ALLOWED.

HARRY TRAYER ET AL. V. NORA SETZER.

FILED DECEMBER 21, 1904. No. 13,563.

1. **Husband and Wife:** ACTION. In this state the common law disability of husbands and wives to maintain suits at law against each other upon contracts between them has been removed by statute.
2. **Illegitimate Children.** The marriage of the parents of illegitimate children does not legitimate the latter, except upon the conditions prescribed by section 31, chapter 23 of the Compiled Statutes.
3. ———: SUPPORT: BOND. The moral obligation of the father of illegitimate children to provide for their support is a sufficient consideration for his bond so to do.
4. **Bastardy:** FRAUD. Bastardy proceedings begun against the father are not abated by his fraudulent marriage with the mother not consummated by cohabitation with but followed by immediate abandonment of her.

ERROR to the district court for Nemaha county: JOHN S. STULL, JUDGE. *Affirmed.*

John C. Watson and *B. F. Neal,* for plaintiffs in error.

J. S. McCarty and *H. A. Lambert, contra.*

AMES, C.

The facts in this case are not in dispute and are narrated in the brief of plaintiff in error as follows:

"As appears by the petition filed in the court below the defendant in error, Nora Setzer, commenced before the county court against Henry Trayer, one of the plaintiffs in error, a prosecution for bastardy. The bastardy complaint was filed on the 17th day of January, 1902, by Nora Setzer, the defendant in error, whose name was at the commencement of this action in the district court, Nora Trayer. On the 2d day of February, 1902, the prosecutrix was delivered of twins. That on the 31st day of January, 1903, the prosecutrix and the said Harry Trayer

were married and the bonds of matrimony had never been dissolved. That after the marriage it was brought to the attention of the district court for Nemaha county that the said Harry Trayer refused to live and carry out his marriage vows with his then wife, and he, Harry Trayer, 'was brought into court where he appeared with his attorneys in open court at the regular February, 1903, term, thereof, and on said bastardy proceedings being called up and coming on for trial, he pleaded guilty thereto and in open court admitted that he was the father of said children,' whereupon the court adjudged the said Harry Trayer to be the father of said bastards and required him to enter into a bond with sureties for the payment of $1,000 for their support and maintenance, and thereupon the bond in suit was entered into by the defendants (plaintiffs in error) as such sureties. Thereafter, to wit, on the 16th day of May, 1903, the plaintiff instituted this action against the said Harry Trayer and his bondsmen, John Trayer and Albert Moody, plaintiffs in error herein. The plaintiffs in error answered, and the defendant in error replied thereto, setting up the above facts. The plaintiffs in error filed a motion for judgment upon the pleadings, which motion was overruled, and the court then permitted the plaintiff to call a jury, prove her bond, and entered judgment thereon. Plaintiffs in error filed motion for a new trial which was overruled. This action is brought to reverse the aforesaid proceedings."

No objection was made in the district court to the prosecution of the action in the name of Nora Setzer instead of that of Nora Trayer, and as such an objection is merely formal and not affecting the merits, it cannot be made for the first time in this court. It cannot be doubted that the plaintiff is the person for whose use and benefit the bond was given and is the real party in interest, whatever may be her true name.

It is urged by plaintiffs in error that husband and wife are, in legal contemplation, but one person, and are incompetent to sue each other at law, but this court in *May*

v. May, 9 Neb. 16, decided that question the other way, and it is not worth while to reopen the discussion.

It is next contended that the marriage of the parties legitimized their offspring; and that a wife cannot maintain a proceeding in bastardy against her husband to compel obedience by him to his marital obligations. We think, however, that section 31, chapter 23, of the Compiled Statutes, 1903 (Annotated Statutes, 4931), expressly negatives the idea that under circumstances like those in this case the marriage legitimizes the offspring. To accomplish that end the parents must, after the marriage, have had other children, and the father must have adopted the bastard into his family or acknowledged him in writing signed in the presence of a competent witness. This statute has, it is true, direct reference only to title to property by descent, but it is the only statute in this state relating to legitimation, and may fairly be taken as expressive of legislative policy with reference to the whole subject. None of these conditions is satisfied in this instance. Trayer has never cohabited with the plaintiff as her husband, or contributed toward her support or that of her children, and his nominal marriage to her was evidently a fraudulent device to defeat the proceeding in bastardy. To allow this defense would be to permit him to perpetrate a barefaced fraud not only upon the mother, but upon the public who are entitled to be protected from the consequences of his wrong doing. All the authorities cited by plaintiffs in error are either from states in which the wife is under a legal disability to sue her husband at law, or are cases in which the offspring had been legitimated in accordance with a local statute. Such authorities are, of course, not in point.

Plaintiffs in error do not deny that, but for the foregoing objections, the instrument sued upon is valid and enforceable, and no reason occurs to us why it is not so. The father is under a moral obligation to support his children, and that duty alone, even in the absence of the bastardy statute, is without doubt a sufficient consideration

for a bond conditioned for its performance. The practical situation in this case is not different to what it would have been if the marriage had not taken place, and it would be a reproach to the law if the defendant in error and the public are both without remedy.

We recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

GEORGE W. HAWKE V. ANDREW KERR.

FILED DECEMBER 21, 1904. No. 13,647.

Review. When the verdict and judgment are such as alone could be upheld by the undisputed and indisputable evidence, the court will not examine the record for the ascertainment of alleged errors occurring at the trial.

ERROR to the district court for Gage county: JOHN S. STULL, JUDGE. *Affirmed.*

E. F. Warren and *E. O. Kretsinger*, for plaintiff in error.

Hazlett & Jack, contra.

AMES, C.

This is an action for damages for breach of an alleged oral contract by the defendant to borrow a sum of money from the plaintiff for a term of years, and to secure the repayment of the same, with interest, by a mortgage upon lands of the defendant. The answer pleads the statute of limitations and the statute of frauds, together with a general denial. The evidence fails completely to establish the agreement set forth in the petition, but it

is shown, with but little if any dispute, that the defendant's lands were subject to sale upon existing decrees of mortgage foreclosure, and that the plaintiff agreed to purchase them at judicial sale, and hold the title in trust to convey them to the defendant at the expiration of a specified term of years, upon being repaid the purchase price and interest, and that the lands, without the fault of the defendant, who had no control over the decrees of foreclosure, were not advertised or offered for sale. The only controversy in this respect is as follows: Certain lands of the defendant were exposed to sale under a decree against them, and he contends that they were all that were the subject of his agreement with the plaintiff, and that the latter by refusing to buy them committed a breach of the agreement himself; but the plaintiff contends that the agreement included other lands which were not offered, and that he was therefore excused from buying those that were so. Under the circumstances we do not see how this dispute is material.

There was a verdict and judgment for the defendant, and the plaintiff prosecutes this proceeding, alleging several errors as having occurred at the trial. There is a wide if not fatal variance between the contract alleged in the petition and that proved at the trial; and of the latter, which was never perfected, the defendant is not shown to have been guilty of a breach. There are a large number of alleged errors assigned in the petition in error and in the brief of counsel which we do not feel called upon to discuss because, granting them to be well assigned and to be as flagrant as it is contended that they were, they did not contribute to the establishment of the above recited facts, about which there is no real dispute, nor would their absence have disclosed a different condition of affairs. In our opinion the verdict is the only one which could have been upheld by the undisputed evidence, and we recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

FIDELITY & DEPOSIT COMPANY OF MARYLAND V. ARNOLD P. LIBBY.

FILED DECEMBER 21, 1904. No. 13,648.

1. **Indemnifying Bond**: DURATION. A bond of indemnity, not stipulating how long it shall remain in force, but covenanting that so long as it shall so remain the obligor shall be paid an annual premium in advance, does not require the payment of the premium so as to continue the obligation, but leaves the obligee at liberty to decline to make payment and thus put a period to the contract so far as the rights of third persons are not affected.

2. **Official Bonds**: STATUTE: AMENDMENT. The act of 1895 (Laws 1895, ch. 22) entitled "An act to facilitate the giving of bonds, undertakings and recognizances, and to authorize the acceptance of certain corporations as surety thereon, and to repeal all acts and parts of acts in conflict herewith," is ineffectual as an amendment or repeal of chapter 10 of the Compiled Statutes, entitled "Bonds and Oaths—Official," or to dispense with personal sureties upon official bonds as required by that chapter.

ERROR to the district court for Johnson county: JOHN S. STULL, JUDGE. *Affirmed.*

S. P. Davidson, for plaintiff in error.

Hugh La Master, contra.

AMES, C.

On the 11th day of January, 1902, W. W. Wheatley was inducted into the office of treasurer of Johnson county, and appointed the defendant Libby as his deputy. Wheatley had procured the plaintiff to become surety on his official bond, and as part consideration therefor had

promised the plaintiff that it should be permitted, for a stipulated premium, to execute as surety the official bond of the deputy. Both bonds were executed accordingly, and were accepted and approved by the proper authority. Libby made a written application for his bond, reciting that it was to be executed in consideration of an annual premium of $50, payable annually in advance, which was to be paid by Wheatley, and the latter did pay the first year's premium accordingly. At the expiration of the first year, namely, on the 30th day of December, 1902, the deputy executed another official bond with personal sureties, to the acceptance and approval of the county board, and on the 27th day of January following, the board, in session, entered an order reciting the giving and approval of the last mentioned instrument, and purporting to release and discharge the plaintiff from liability because of the then future liability of the deputy. Both Libby and Wheatley then refused to pay the second year's installment of premium in consideration of the bond executed by the plaintiff, and this action was brought against the former for the recovery of the same. Neither the application nor the bond recited a prospective term of the principal's office or of the continuance of the obligation, except that the former stipulated that Libby should pay "fifty dollars ($50) per annum in advance, while said bond shall continue in force," from which it is implied that it continued in force for the term of at least one year ensuing the payment of any such instalment.

The plaintiff contends that it is also implied that the obligation was to continue during the incumbency of Libby under his then present appointment as deputy; that he was not discharged from his office at the time of the giving of the new bond, but remained continuously therein; and that the county board were powerless to impair the obligation of the contract or to release the plaintiff from its obligation thereon. We suspect that if it should turn out that Libby has defaulted since the expiration of the first year the plaintiff will entertain a different opinion. The fair

inference, from the recitals in the application, of which both the treasurer and the county board had full knowledge, is that the plaintiff undertook to become and remain bound so long, and so long only, as the agreed annual premium should be paid in advance. In this respect the contract is of the same character as the ordinary policy of insurance, to which it is generally analogous and out of which it grew. It is a contract for one year, renewable annually by the payment of a stipulated premium. If the premium is not paid it "lapses" or ceases to be obligatory as between the parties to it, except as to past transactions, although there may or may not be circumstances continuing it in force as to interested third persons, about which we express no present opinion. If in the present instance the county board might have perpetuated the obligation by reliance upon estoppel in ignorance of the delinquency of the second annual premium, it does not occur to us that they were bound so to do, or that the plaintiff has been injured or has any just ground of complaint because they saw fit to discharge the estoppel, which we have no doubt they had power to do and did effectively do. The appointment of a deputy county treasurer is not for a fixed term, but is revocable at pleasure. There was no formal revocation and reappointment in this instance, but the conduct of the deputy and of the county board was with the knowledge and concurrence of the treasurer and, we think, amounted thereto in practical effect. Whether such a bond would be insufficient for the induction into office of a person elected for a fixed term of more than a year, or, if not, whether deferred premiums would be recoverable in such cases, are questions not involved in the case. Seemingly one consequence or the other is inevitable.

We are also of the opinion that the instrument in controversy is not a legal contract, but derives whatever obligatory force it has from principles of estoppel. Section 9, chapter 10 of the Compiled Statutes enacts that official bonds of all county officers shall be executed by the principal, and at least two sufficient sureties who shall

be freeholders of the county. This requirement doubtless has reference to natural persons. The instrument in suit was supposedly executed pursuant to chapter 16 of the Compiled Statutes, which was passed in 1895, under the title, "An act to facilitate the giving of bonds, undertakings and recognizances, and to authorize the acceptance of certain corporations as surety thereon, and to repeal all acts and parts of acts in conflict herewith." The fourth section of the act reads: "All acts and parts of acts in conflict herewith are hereby repealed." Laws, 1895, chapter 22. Neither in the title of the act, nor in the repealing clause, is there any reference to the subject of official bonds, nor will anyone suppose that section 9 of chapter 10, above quoted, is repealed so that an official bond with personal securities is no longer authorized. If anything had been accomplished it would have been an amendment of that and several other sections of the same chapter so as to permit the approval of bonds by corporations in lieu of, or in substitution for, bonds required to be given by law. But such a purpose is not indicated by the title, nor is any section of any existing statute set forth or referred to, as sought to be amended, in the body of the act. We are of opinion that to hold that this act authorizes the acceptance of bonds of corporations in lieu of, or in substitution for, official bonds required by chapter 10 of the Compiled Statutes would be in plain violation of section 11, article III of the constitution. Chapter 10 of the Compiled Statutes is an act complete in its itself, having sole reference to the subject of official bonds, concerning which it makes specific and imperative regulations. We are of opinion that it cannot be amended by an act in the title or body of which that subject is not mentioned.

There was a judgment for the defendant both in a justice's court, where the action was begun, and in the district court upon appeal. The plaintiff prosecutes error. We recommend that the judgment be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

PETER B. FIELDING V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED DECEMBER 21, 1904. No. 13,669.

Directing Verdict. Upon the undisputed evidence the trial court rightfully directed a verdict for the defendant.

ERROR to the district court for Custer county: HANSON M. GRIMES, JUDGE. *Affirmed.*

C. W. Beal and *N. T. Gadd,* for plaintiff in error.

J. W. Deweese and *Frank E. Bishop, contra.*

AMES, C.

Plaintiff, Fielding, was a section-hand, and Anderson was his foreman, employed by the defendant company at Mason City in this state. The track extends easterly and westerly past the station. At some point west of the station the two men loaded some railway ties on a push car. Fielding placed himself at the west end of the north side of the car and pushed it eastward. Anderson followed along at the west end of the south side, and as the car moved forward threw or pushed the ties off from it, at intervals, so that they fell at the south side of the track and remained where they struck the ground. After they had traveled some distance and the ties had all been removed in this manner, Anderson told Fielding to return westward with the empty car to the starting point. The latter then went to the east end of the south side of the car and sat down upon it with his back toward the west, and with his right foot

hanging down so as to come in contact with the south ends of the ties upon which the track was laid, and began propelling the car westward by kicking and pushing against them. It was broad daylight; the men had co-operated in placing the loose ties where they were, which was in plain sight, and both knew that some of them were lying very close to the track in violation of the rule of the company forbidding such things to be left by section-men nearer thereto than three feet. Fielding did not look westward in the direction in which he was pushing the car, or make any particular or especial observation respecting the position of the loose ties. After he had gone some distance his attention was attracted by a call from Anderson, and while he was looking toward him his right foot with which he was "kicking ties" was caught between a loose tie, lying within a few inches of the track, and the flange of the car wheel, and injured thereby. This action was brought to recover damages for the injury. The petition is in the usual form, and the answer is a general denial, coupled with a plea of contributory negligence. There is no conflict in the evidence, and at the conclusion of the trial Judge Grimes directed a verdict for the defendant, and rendered judgment accordingly. The plaintiff prosecutes error.

If Anderson was guilty of negligence in the manner in which he distributed the ties and in permitting them to remain where they alighted, Fielding, who was an experienced workman of mature years and acquainted with the rules of the company, was fully aware of that fact and participated in the fault. The plaintiff did, and was required to do, nothing by the command or direction of Anderson that contributed to the injury, of which the manner in which he propelled the car, and his lack of care in so doing, was the sole proximate cause.

It is recommended that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. ALBERT H. ANDERSON.

FILED DECEMBER 21, 1904. No. 13,681.

1. **Statute:** TITLE. The title, "An act to fix a maximum standard of freight charges on railroads, and to prevent unjust discrimination therein, or secret rates, rebates or drawbacks therefor," contains only one subject.

2. **Carriers:** FREIGHT RATES: VALIDITY. A statute forbidding railroad companies to charge for transportation for any specific distance a greater sum than they charge for carriage over a greater distance is within legislative discretion and is valid.

ERROR to the district court for Kearney county: ED L. ADAMS, JUDGE. *Affirmed.*

J. W. Deweese and *Frank E. Bishop,* for plaintiff in error.

M. D. King, contra.

AMES, C.

The defendant operates a line of railroad extending from Curtis, in this state, eastward through Axtell to Minden. In the winter there are ice-fields at Curtis, from which people both at Axtell and Minden may be supplied, but at the latter place alone is there competition with another railroad. In order to meet such competition, so that Curtis ice will be purchased for consumption at Minden, it became necessary to transport it between the two last named points during the winter of 1902 for a freight

charge of three cents a hundred pounds, which the defendant did continuously in the months of January and February in that year. During the same months the company transported ice from Curtis to Axtell for the defendant in error, Anderson, for which service it demanded and received compensation at the rate of four cents a hundred pounds. The difference in distance is 10 miles in favor, of course, of Axtell. This action was brought by Anderson to recover the difference of one cent a hundred pounds between the charge made against him and the rate in force at the same time between Curtis and Minden. There was a judgment for the plaintiff in a justice's court, and afterwards on appeal in the district court, and the defendant below prosecutes error. The facts as above recited are not in dispute.

Article V, chapter 72, Compiled Statutes, 1903 (Annotated Statutes, 10008), is an act entitled "An act to fix a maximum standard of freight charges on railroads, and to prevent unjust discrimination therein, or secret rates, rebates or drawbacks therefor." Approved February 28, 1881. Laws, 1881, ch. 68. Section 2 of that act is as follows:

"No railroad company in this state shall hereafter charge, collect or receive for the transportation of any merchandise or other property upon the railroad owned or operated by such company within the state a higher rate for such service than was charged by such company for the same or like service on the first day of November, A. D. 1880, as shown by the published rates of such company. And no railroad company shall demand, charge, collect or receive for such transportation for any specific distance, a greater sum than it demands, charges, collects or receives for a greater distance."

It is contended that this section, if not the whole act, is void because of duplicity of subjects in the title. In support of this contention it is argued that the subject of fixing a "maximum standard of freight charges upon railroads" is separate and distinct from that of preventing

unjust discrimination, and secret rates, rebates and drawbacks therein and therefor. We are unable to agree with this view, because, as it seems to us, the prevention of all these latter mentioned practices is essential to the fixity, that is, maintenance, of any standard whatever. There are indeed standards of conduct in plenty, variation from which is permitted and even contemplated, but they cannot properly be called "fixed standards" in the sense of being settled, firm, immovable, in which sense it seems to us evident that the legislature used the qualifying word in this instance. A standard of freight rates from which transportation companies should be permitted to depart at will, generally or specially, openly or secretly, could hardly be regarded as a real or true standard in any sense. Counsel for plaintiff in error admit, in argument, that the subjects are so nearly related in nature that they might properly have been united in the title to one bill or act, but they say that the syntactical arrangement of the title in this instance is such as to divide them into two or more distinct classes. If this were true, we should think that the line or lines of discrimination would need to be very clearly and obviously drawn, so as to be apparent without careful scrutiny, in order to defeat an act of the legislature of the validity of which every reasonable presumption is to be indulged. A very slight transposition and reconstruction of the sentence suffices, as we understand counsel, to meet their own requirements. Omit the disjunctive "or" and the adverbs "therein" and "therefor," whose auxiliary offices are requisite only for definiteness of expression, and transfer the words "of freight charges on railroads" to the end of the sentence, and the singleness of subject becomes evident. The title will then read: "An act to fix a maximum standard and to prevent unjust discrimination, secret rates, rebates or drawbacks of freight charges on railroads." Surely an important legislative enactment ought not to be annulled for so slight an error, if it is an error, of syntax.

We do not feel called upon to enter upon the inquiry

whether the discrimination complained of in this instance was just or unjust, considered solely in the light of the circumstances in which it was made. It is said in some of the decisions that the justice or injustice of freight rates is a judicial rather than a legislative question, and in the connection in which this utterance has been made we do not know that it is open to criticism; but it is not to be overlooked that legislative, executive and judicial functions merge in each other by imperceptible degrees, so that it is often impossible to distinguish clearly between them, and that the exercise of discretion and judgment by the legislature is indispensable to the framing and enactment of any statute. So long as they keep within their province, the courts are not at liberty to sit in review of their conduct, or decide upon its wisdom or justice. By section 2 of the act above quoted, the legislature determined that it is unjust for a railroad company to charge for carriage for any specific distance a greater sum than it charges for a greater distance, and absolutely prohibited the practice. We are unable to say that we are better qualified to decide upon this matter than were the members of the two houses, or that, if we were so, there is anything in the nature of the judicial office that confers upon the court jurisdiction to revise the legislative judgment. The objection that in particular cases and classes of cases the statute may work injustice is one from which the wisest and most beneficent laws are not exempt, and one which lawmakers necessarily consider in weighing the advantages and disadvantages to the general public of any proposed measure. That is their chief and most important duty, and it is because it is so that it is believed that legislation is most safely entrusted to representative bodies whose members are elected from all classes of the community and from all regions of the state.

It is therefore recommended that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

ELIZABETH HARDINGER, GUARDIAN, V. MODERN BROTHERHOOD OF AMERICA.*

FILED DECEMBER 21, 1904. No. 13,604.

1. **Insurance**: BENEFIT CERTIFICATE: DEFENSE OF SUICIDE: BURDEN OF PROOF. In an action upon a municipal benefit certificate, where the defense interposed is suicide, the burden is upon the defendant to establish such fact by a preponderance of the evidence.
2. **Cause of Death**: QUESTION FOR JURY. The question of the proximate cause of death in such an action is ordinarily a question of fact for the jury, and should not be taken from its determination unless the evidence is of such a nature as to clearly and certainly point to but one reasonable conclusion.
3. **Case Distinguished.** *Sovereign Camp of the Woodmen of the World v. Hruby*, 70 Neb. 5, examined and distinguished.
4. **Circumstantial Evidence.** When circumstantial evidence only is relied on to establish suicide, the defense fails unless the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another. *Modern Woodmen of America v. Kozak*, 63 Neb. 146, followed and approved.
5. **Cause of Death**: QUESTION FOR JURY. *Held*, That, under the facts and circumstances proved in this case, reasonable minds might differ as to whether deceased came to his death from a wound inflicted by his own hand with suicidal intent, and that such question should have been submitted to the jury under proper instructions.

ERROR to the district court for Dawson county: CHARLES L. GUTTERSON, JUDGE. *Reversed.*

Warrington & Stewart and *H. M. Sinclair*, for plaintiff in error.

J. E. Markley, George C. Gillan and *J. J. Sullivan, contra.*

* Rehearing allowed. See opinion, p. 869, *post.*

OLDHAM, C.

The Modern Brotherhood of America, defendant in error in this case, is a fraternal beneficiary association doing business in this state. It issued a membership certificate to one George S. Hardinger upon his joining a lodge of this association at Overton, in Dawson county, Nebraska, on May 3, 1899, which provided, in substance, that in case of the death of said member while in good standing in the lodge the beneficiary therein named shall participate in the mortuary fund of said association to an amount not exceeding $3,000 within 90 days after proof of such death. This certificate also contained the following proviso: "If the holder of this certificate shall die by his own hand, whether sane or insane, then this certificate shall be null and void and of no effect, and all moneys which shall have been paid and all rights and benefits which may have accrued on account of this certificate shall be absolutely forfeited." Plaintiff in this action is the wife of George S. Hardinger and the guardian of the beneficiary named in the certificate.

On the 5th day of April, 1902, Hardinger was found on Wooded Island, in Jackson Park, in the city of Chicago, Illinois, dead or dying from a pistol shot wound in his head. Payment of benefits was refused by the association, and this action was brought in the district court for Dawson county by the guardian of the beneficiary to enforce payment thereof. The association for its defense alleged suicide. On the trial, when all the evidence had been taken, the trial court directed a verdict for the defendant. This was done upon the theory that there was but one reasonable conclusion to be drawn from the evidence, and that was that Hardinger took his own life. Judgment was rendered upon this verdict, from which error is prosecuted to this court by plaintiff.

The only assignment of error necessary to review is that the court erred in directing a verdict under the testimony. A careful review of the evidence contained in the bill of

exceptions shows that Wooded Island, the place of the tragedy, is located in Jackson Park, in the city of Chicago, and is one of the public parks in that city. This island is surrounded by a lagoon of water, and is a long narrow strip of land, containing about 20 acres. It is widest at the south end, and gradually tapers to a very narrow point at the north end of the island. There are two bridges, one at the north and one at the south end of the island, over which foot passengers enter. There is a fringe of willows and shrubbery about 25 yards in width around the shore of the entire tract. This shrubbery is quite dense in most places. The island is patrolled by park policemen, two of whom were on the island at the time the shot was fired that resulted in Hardinger's death. These police officers are the only witnesses that testified concerning the facts and circumstances surrounding the tragedy. Maher, one of these officers, who had been on the island from one o'clock in the afternoon until the time of Hardinger's death, which occurred at 7:10 P. M., testified as follows:

Q. Do you remember the occurrence of finding a man there dead that evening?

A. Yes.

Q. State what you first observed.

A. I was about 200 yards away. I heard the shot, and then officer Brown was coming along, and we thought it was somebody shooting at ducks in the lagoon at the time. Officer Brown said, "There is somebody shooting ducks on the lagoon." He went through the shrubbery and I went in the edge of the shrubbery, and there was an old log laid in the shrubbery, and we saw Hardinger's body lying alongside of the log. Brown was in the edge of the shrubbery at the time and I was right close to him, about a couple of yards.

Q. Go on and describe now just what you observed as to the position of the body.

A. He had evidently been sitting on this log, and he had a revolver at his right-hand side, and the bullet lodged

in the left eye. He was not quite dead at the time, so officer Brown stayed with him, and I went over to the Wooded Island police station, and they came with the wagon.

This witness further testified that the revolver along by the side of deceased had three empty chambers in it and three chambers with cartridges, one of which appeared to have been recently discharged. He also said that Hardinger was unconscious when they came to him; never spoke, and only lived a few minutes after their arrival. He further described the wound, saying the bullet had entered through the right temple near the right eye and penetrated to the left eye, where in his judgment it had lodged. He also testified that they could not see Hardinger from where they were standing when the shot was fired, even if he had been standing up, because there was an elevation or a kind of a hill between them and the place of the shooting. He also said deceased's hat was lying on the west side of the log and his body on the east side. The testimony of officer Brown was the same in all essential points as that of officer Maher, differing solely in his estimate of the distance between the deceased and the officers at the time the shot was fired, and also stating that the hat of deceased was on the log or the stump of the log by which he was lying, when found. This slight variance tends to throw no light on any material circumstances surrounding the death. When officer Maher notified the authorities, an ambulance wagon was sent to the island, and the body of deceased was taken to the morgue, where it was identified by his widow, plaintiff in this action, and turned over to her for burial. On Hardinger's body the officers found, among other things, a memorandum book giving his name and place of residence, the number of his watch, and the size of his hat, and containing the following entry: "There is nothing to tell, simply weary." This memorandum book was offered in evidence, and has the appearance of a book that had been carried for some time by the deceased. The entries in

this book are conceded to have been in the handwriting of the deceased. There is nothing to indicate that any of the entries had been newly made, and there is no evidence that deceased had a pencil about him when found, although these entries were made with a lead pencil and are dim from apparent wear. As tending to show a probable motive for suicide, it was proved that Hardinger was formerly the cashier of a bank at Overton, Nebraska, and that he was short in his accounts, and had for this reason been dismissed from his position as cashier. This occurred nearly three years before his death, and there is no evidence that he was ever prosecuted or threatened with prosecution on account of his defalcation. There was also evidence introduced tending to show that Hardinger was overcome by escaping gas while alone at his home in June, 1901, and that for sometime thereafter he was quite sick and somewhat mentally deranged; that at one time shortly after the accident he disappeared from his home, and was gone from Monday until Tuesday night, and that when he returned he informed his wife that he was looking for his child which had been stolen; that as a matter of fact his child was at home all the time, and the idea of its having been stolen was a delusion. As against this evidence tending to show temporary insanity and delusions, the plaintiff, wife of deceased, testified that he had entirely recovered from the effect of his partial asphyxiation, and was in his normal condition, both of mind and body, for five or six months before his death; that their domestic life was peaceful and happy, that they resided in a suburb of Chicago called Englewood; that on the morning of his death, Hardinger left at his ordinary time intending to go to the city and return, as was his custom, at 5 o'clock for his dinner. This was the last time that anyone appears to have seen him until he was found by the policemen in a dying condition in the park.

This is all the material testimony in the record tending to throw light on the facts and circumstances surrounding Hardinger's death, and the question now arises, could

reasonable minds, in the light of this testimony, draw different conclusions as to whether the shot that ended Hardinger's life was fired with his own hand and with suicidal intent, or whether it might have been accidentally fired by him or someone else, or whether it might have been intentionally fired by someone else? If but one reasonable conclusion can be drawn, and that, that the shot was fired by deceased with suicidal intent, then the learned trial court was right in directing a verdict; but if the inferences either of an accidental shot by deceased or anyone else, or of an intentional shooting by someone else, can reasonably arise from this evidence, then the question as to whether the defense of suicide had been established by a preponderance of evidence should have been submitted to the jury for its determination under proper instructions. We think that the deductions that must follow from the testimony are that Hardinger came to his death from a gunshot wound, and that the shot was fired from the revolver that was found by the officers at his right hand. We think it is clear enough that the shot was fired from this revolver, because but one shot was fired, and the empty cartridge in this revolver appearing to have been recently discharged shows to a fair degree of certainty that the shot came from it. But whose revolver was this? Nobody who testified seems to know. There was no effort made to show that Hardinger owned a revolver or that he ever carried one, nor is there a scintilla of evidence in the record that before this occurrence he had ever threatened to commit suicide. Nobody saw him come on the island, although officer Maher had been there on his beat for six hours. Nobody seems to know whether he came alone or whether he came in the company of others. When his body was discovered it was getting dark, and the policemen made no effort to search the island to find whether anyone else was on there at that time. From the sight of the dying man and the revolver lying near at hand, the officers jumped at the conclusion that it was a case of suicide, and made no effort to investi-

gate any other theory which might have accounted for the death. There is no evidence even that the wound was powder-burned, as would have been likely had it been inflicted by deceased's own hand. While from this testimony we can readily see how a reasonable mind might infer that the death was self-inflicted and with suicidal intent, yet on the other hand we think it would not be an unwarranted and unreasonable conclusion from all the facts and circumstances in evidence that this wound might have been received at the hands of another, either through accident or intention. When the shot was fired the officers who were north of the deceased could not have seen him even if he had been standing erect, as Maher testified, because of an elevation or "kind of hill" between them. Now, if they could not have seen Hardinger, they could not have seen someone else standing near him, and if someone did stand near him and shoot him, either intentionally or accidentally, such person could have dropped the revolver where it was found, skirted the underbrush down to the south bridge of the island, and have escaped in the growing darkness without observation. While the memorandum in the book found on his person, and the incident of his partial asphyxiation by gas, might each tend to suggest the probability of suicide, yet neither nor both of these incidents conclusively show a suicidal intent, and the business failure of the deceased is so remote from the occurrence as to throw little light upon it.

It is urged by counsel for defendant in error that this case falls clearly within the rule recently announced by this court in *Sovereign Camp of the Woodmen of the World v. Hruby,* 70 Neb. 5. In this case it was held that the facts and circumstances surrounding the death of Hruby so clearly and unmistakably pointed to suicide that no other reasonable conclusion could be drawn from them, and therefore that, as a question of law, the court should have directed a verdict in favor of the defendant. In our judgment there is a well defined difference between the facts and circumstances surrounding Hruby's death and

those surrounding the death in the case at bar. In the *Hruby* case the evidence shows that he was strongly attached, either by ties of kindred and long association or by the more tender ties that bind the different sexes together, to a young lady, Mary Vlach, who was the beneficiary named in his certificate; that while working in South Omaha he received a telegram announcing the sudden death of Mary Vlach; that on receipt of this message he came to the home of the deceased in Cuming county; that when informed of the death of the young lady he was greatly depressed in spirit, and that his depression continued or increased when informed that she had died by her own hand. While the mother of the deceased young lady was preparing a meal for Hruby and the members of the family, he went into a bedroom and sat down on a bed adjoining the one on which the young lady's body was lying. After this he was seen by the mother walking the floor in the kitchen adjoining this room. In a few minutes the mother heard a shot, ran into the room, and saw Hruby standing in front of the dead girl with a revolver in his right hand and a bullet wound in his head; he turned partially around, reeled and fell face downward, and expired almost instantly. In this case, as said by HOLCOMB, J., "the question for consideration was narrowed to the proposition, solely, as to whether the death was accidental or the result of an intentional taking of his own life." In other words, it was clearly and unmistakably proved that Hruby came to his death from a pistol-shot wound fired by his own hand, for there was no one else in the room alive to fire the shot. So that the only alternatives were either accidental or intentional shooting by the deceased, and the conduct of the deceased and the circumstances surrounding the occurrence so plainly indicated suicide that it was held that no other reasonable inference could be drawn. Now in the case at bar there is no evidence that clearly and unmistakably shows that Hardinger shot himself, nor do all the facts and circumstances relied upon to show a suicidal intent

point to this motive with such unerring certainty as to exclude every other reasonable hypothesis. In *Modern Woodmen Accident Ass'n v. Shryock,* 54 Neb. 250, this court said:

"In our opinion the question of what is the proximate cause of death in an action like that now under consideration, is a question of fact to be determined by the jury from a consideration of the evidence and the determination of this question should not be withdrawn from the jury unless, from an admitted state of facts, all reasonable men fairly exercising their judgments must draw the same conclusion."

The legal presumption is always against suicide, and consequently the burden of proving self-destruction is upon the party pleading it. *Modern Woodmen of America v. Kozak,* 63 Neb. 146; *Travelers Ins. Co. v. McConkey,* 127 U. S. 661; *Schultz v. Insurance Co.,* 40 Ohio St. 217.

In *Modern Woodmen of America v. Kozak, supra,* it was said by this court:

"In the case of *Leman v. Manhattan Life Ins. Co.,* 46 La. Ann. 1189, it is said: 'In such action, when the defense is self-destruction, the burden of proof is on the insurer to establish the suicide, and when circumstantial evidence only is relied on, the defense fails, unless the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another.' *Travelers Ins. Co. v. Nitterhouse,* 11 Ind. App. 155; *Jones v. United States Mutual Accident Ass'n,* 92 Ia. 652. In the last cited case it is said: 'Where, in an action on an accident policy, it appears that the insured was killed by a pistol shot, the burden is on the insurer to show that the shot was not accidental.'"

We think that under the facts proved in this case reasonable minds might draw different conclusions as to whether the death of Hardinger was self-inflicted with suicidal intent or whether it resulted from other causes.

We therefore recommend that the judgment of the dis-

trict court be reversed and the cause remanded for further proceedings in conformity with this opinion.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED.

The following opinion on rehearing was filed April 5, 1905. *Judgment of reversal vacated. Judgment of district court affirmed:*

1. **Insurance:** ACTION ON CERTIFICATE: BURDEN OF PROOF. In an action on a beneficiary certificate, or a life insurance policy, where the company or association alleges suicide as a defense, the burden of proof is on the defendant to establish that fact by a preponderance of the evidence.
2. **Presumption:** EVIDENCE. The presumption in such a case that a sane person will not destroy his own life is a rebuttable one and must yield to proof of physical facts clearly inconsistent with it.
3. ———: ———. Competent proof of facts and circumstances surrounding and connected with the death of the assured which point clearly and unmistakably to the conclusion that he took his own life, and which exclude all reasonable probability of death by murder or accident, is sufficient to overcome and destroy the presumption above mentioned, and establish, at least *prima facie*, the defense of suicide.
4. **Directing Verdict.** If nothing is shown by either party inconsistent with the proof of such facts, it is the duty of the trial court to direct the jury to return a verdict for the defendant. *Sovereign Camp of the Woodmen of the World v. Hruby*, 70 Neb. 5, followed.

BARNES, J.

This case is before us a second time for our consideration. In an opinion, *ante*, p. 860, written by Mr. Commissioner OLDHAM, and approved by the court, it was held that the trial court erred in directing a verdict for the defendant below. A rehearing was allowed, the case has

been reargued, and the same question is again presented for our consideration. Our former opinion contains a full and complete statement of the pleadings, from which it appears that the defense of suicide was the only issue tendered for trial in the court below. On that question the burden of proof was on the defendant. *Modern Woodmen of America v. Kozak*, 63 Neb. 146; *Travelers Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. Rep. 1360, 32 L. ed. 308; *Schultz v. Insurance Co.*, 40 Ohio St. 217, 48 Am. Rep. 676. Examining the record, in view of this rule, we find that it discloses that one George S. Hardinger joined the association on the 8th day of April, 1899, and that at a later date a beneficiary certificate was issued to him in favor of his minor son; that he was found dead, or in a dying condition, on Wooded Island, in Jackson Park, in the city of Chicago, on the evening of April 5, 1902. On the trial in the district court it was shown by the association, in support of its defense, that the deceased was in charge of a bank in Overton, Nebraska, from 1895 to 1899; that early in the latter year he became a defaulter for something like $30,000, and was discharged from his position for that reason; that he never made his shortage good, but was not prosecuted criminally, nor was he unduly pressed for the payment of his shortage, because of his relationship to the owners of the bank; that later on in that year he moved to Chicago, rented rooms in a flat at number 6,448 Armour Avenue, in Englewood, a suburb of that city, and established his residence there; that after he lost his position with the bank he was despondent and troubled about his business matters; that in June, 1901, while his wife was visiting her parents at Tinley Park, about 25 miles from Chicago, and while he was alone in his house, he was overcome by escaping gas. He was found by the postman, who called a physician, and he was resuscitated. He was ill from the effects of his asphyxiation for a considerable time; was treated by one Dr. Lovewell, and it appears he recovered from that illness in about six weeks. When asked by the doctor on one oc-

casion as to how the matter occurred, he refused to make any explanation of it; that when the same question was asked him by his wife, he informed her he did not know anything about it. From that time until his death it appears that he was ill at times; that in August, 1901, he was troubled with hallucinations; and believed that his child had been taken away. He thereupon left home in search of it, being gone about two days. It was also shown that it was his habit to go to the city every morning to amuse himself, and remain there until time for the evening meal; that he was without employment, but had, in a great measure, recovered his physical health at the time of his death. His condition can best be explained by quoting the evidence of his wife:

Q. After he was sick in June he never went to work again as bookkeeper, did he?

A. He did not.

Q. And after he was sick in June he was confined to the house for some time, wasn't he?

A. A few days.

Q. And he was under the care of the doctor for some time, was he not?

A. In June?

Q. Yes, and until along in October, he was still doctoring with Dr. Lovewell, wasn't he?

A. I don't know; I don't remember.

Q. And in August he was under the delusion that his son was stolen?

A. At that time, yes.

Q. And from that time on did he go down town every day?

A. He was in the house about a week until he was well again, and he went down town every day.

Q. That was after he was wandering around?

A. Yes.

Q. Then he would go down town?

A. Yes.

Q. Do you know what he went down for?

A. Just went down for pastime.

Q. Went down for pastime?

A. That's what he said.

Q. Now you say after that time in August, when he was away a day and a half, after he got well he was all right mentally. Do you mean that?

A. He was all right, but he was sick.

Q. Well mentally?

A. Well, I think he was at times.

Q. You think he was at times?

A. Most of the time.

Q. A part of the time he was mentally unbalanced?

A. Well, I wouldn't call it unbalanced.

Q. Under depression?

A. Well, he was dizzy.

Q. And along toward evening he would have fits of melancholia, or depression?

A. No, he was the same all the time, but suffered from insomnia; couldn't sleep.

It further appears that on the morning of April 5, 1902, Hardinger left his house and went to the city as usual; that at about seven o'clock that evening two policemen, who were on duty on what is called Wooded Island, in Jackson Park, heard a shot fired at the distance of from 100 to 200 yards from them, and hurried immediately to the place from whence the sound came to ascertain its cause. They found Hardinger lying on his back by the side of a log; his blood and brain oozing from a wound inflicted by a pistol shot on the right temple at the edge of the hair line in front of the ear; the wound was blackened around its edge where the bullet entered; a revolver lay at his right hand with three cartridges in its chamber, one of which had been recently discharged, and the smell of powder smoke still lingered about the place. A careful examination disclosed no footprints or traces of the presence of any other human being near the body, or in that immediate vicinity; his clothing was undisturbed; his watch, ring, purse and other effects were found on

his person, and in his vest pocket was a memorandum book in which his name and address were written. This memorandum book had written in pencil with his own hand upon the first leaf or page, lengthwise thereof, the words: "There is nothing to tell; simply weary." The book contained no other writing of any kind, and Hardinger died without regaining consciousness. The testimony also showed that no other person was present on that part of the island; that if there had been any other person in that vicinity the officers could have seen him.

With the foregoing facts established by the evidence the district court, on the motion of the defendant association, directed the jury to return a verdict in its favor, and the only question for our consideration is, was such direction error? It may be stated at the outset that self-destruction is not to be presumed. In other words, the presumption arising from the general conduct of mankind is that a sane person will not destroy his own life. But this is a rebuttable presumption, and easily yields to physical facts clearly inconsistent with it. It is not proof, nor does it stand in the way of proof, and when sufficient evidence is introduced to overcome this legal presumption it disappears. On mature reflection we are of unanimous opinion that the proof in this case clearly overthrows the presumption above mentioned, and excludes all probability of death by accident or by the hand of another. The undisputed facts and circumstances in this case lead naturally and rationally to but one inference, and that is that George S. Hardinger shot himself intentionally. It seems to us that no other fair, just or reasonable conclusion is possible. When the facts naturally and reasonably lead the mind to but one conclusion, there must be something in the circumstances, something somewhere in the evidence, to suggest murder or accident. No circumstances can be pointed out consistent with the use of the weapon, for some unexplainable purpose, from which accidental shooting probably resulted. To indulge in such inference is to engage in fanciful conjecture. The basis of

such a conclusion is not to be found in the evidence, but if it exists at all it is altogether outside of it, and is a guess, a surmise or a conjecture. No fact or circumstance can be pointed out in the evidence which indicates that the use made of the revolver by Hardinger was accidental; and there is nothing in the record from which a presumption of death by murder can be justified. There is no conflict in the evidence. It all points unmistakably and clearly to death by suicide. Any other conclusion would outrage all reason. And had the question been left to the jury, and had that body found otherwise, its finding would have been set aside as against the evidence. A verdict of the jury for the plaintiff in this case would have had no basis except mere conjecture. In such a case it is the duty of the court to treat the matter in question as one of law, and direct the proper verdict. *Sovereign Camp of the Woodmen of the World v. Hruby,* 70 Neb. 5.

The rule is well established that, if, from the undisputed facts, different minds may not honestly reach different conclusions without reasoning irrationally, it is not error for the trial court to withdraw the case from the consideration of the jury, and direct a verdict consistent with the facts. *Knapp v. Jones,* 50 Neb. 490; *Shiverick v. Gunning Co.,* 58 Neb. 29. In this case different minds cannot arrive at different conclusions. The evidence points clearly and unequivocally to suicide. In order to reach any other conclusion one must go outside of the record and resort to mere speculation or conjecture. Our former opinion followed *Modern Woodmen of America v. Kozak,* 63 Neb. 146, which counsel for the plaintiff insist is in point and authority for our present decision. An examination of that case shows that nearly all the facts and circumstances tended strongly to prove that Kozak came to his death by his own hand. It was shown, however, beyond question, that the bullet which was taken from the wound in Kozak's head, and which evidently caused his death, was several sizes smaller than the caliber of the revolver which was found near his body, and could not have been fired

from that weapon. If such proof had been made in the case at bar, or if there was any competent evidence to dispute the testimony offered by the defendant in proof of its defense of suicide, an entirely different question would have been presented. In such a case the court should submit the question of fact to the jury; while in the case at bar there was no dispute as to the facts, and the whole matter was properly treated as a question of law.

We are now of opinion that the district court did not err in directing the jury to return a verdict for the defendant, and, for that reason, our former judgment is vacated and the judgment of the district court is in all things

AFFIRMED.

MICHAEL FARRELL, APPELLANT, V. AUSTIN BOUCK ET AL., APPELLEES.

FILED DECEMBER 21, 1904. No. 13,637.

1. Equity. One who fails through culpable inertness to make inquiry when it is his duty to inquire, and by reason of such failure loses a valuable right, is not entitled to relief in equity on the ground of mistake. *Farrell v. Bouck*, 60 Neb. 771, followed and approved.

2. Judgment: REVIEW: LAW OF THE CASE. Judgment of the district court examined, and *held* to be in conformity with the "rule of the law of the case" as established on its former hearing in this court.

APPEAL from the district court for Dixon county: GUY T. GRAVES, JUDGE. *Affirmed.*

J. J. McCarthy, for appellant.

William P. Warner, contra.

OLDHAM, C.

This was a suit in equity instituted by plaintiff in the district court for Dixon county for the purpose of rein-

stating and enforcing in favor of plaintiff, Michael Farrell, a real estate mortgage, which it was alleged had been canceled and released of record through a mistake of fact. The original action was begun in the year 1894, and has been twice reviewed by this court. At the first hearing of the cause in the district court, a judgment was rendered in favor of plaintiff for the relief prayed for in his petition. This judgment was reviewed on appeal in this court in the case of *Farrell v. Bouck*, 60 Neb. 771, and the judgment of the district court was reversed and the cause remanded, because "the cause of action pleaded was not, on the trial, established by the proof." On a rehearing this opinion was adhered to in an opinion by NORVAL, C. J. *Farrell v. Bouck*, 61 Neb. 874. During the pendency of the action on the first appeal, defendant Ryan departed this life, and the cause was revived against his personal representative. When a new trial was had in conformity with the judgment of this court on the first appeal, plaintiff amended his petition, charging in addition to the false representations of defendant Ryan the further allegation that he had been deceived and misled by the representations of defendant Bouck into releasing the mortgage, without making a full examination of the records of Dixon county. On issues joined on this amended petition, the court found for the defendants, and plaintiff brings the cause here for review on appeal.

The material facts underlying the controversy are that in May, 1894, plaintiff Farrell and defendant Ryan signed a note, as sureties, for defendant Bouck, who was the father-in-law of plaintiff Farrell. Defendant Ryan had a mortgage, executed by defendant Bouck on a lot and small store-house in the village of Allen, Dixon county, assigned to him for indemnification of his suretyship on the note. At or near the time this note matured, plaintiff Farrell agreed with his father-in-law, defendant Bouck, that he would pay off and satisfy the note, if defendant Bouck would deed him the village property covered by Ryan's mortgage. This Bouck agreed to do. Farrell no-

tified his cosurety Ryan, who assigned him the indemnifying mortgage. After procuring the assignment of the mortgage, plaintiff took a warranty deed to the premises, duly executed by defendant Bouck and wife, and paid the note. In a short time after this he went down to Ponca, the county seat of Dixon county, and asked the county clerk, who was *ex officio* register of deeds of the county, to make an examination of the title of the village property described in his deed. The clerk did this, and found the property clear of all liens, so far as the records of his office disclosed, except the mortgage which had been assigned to plaintiff. Plaintiff then went to the county treasurer and had an examination made of the tax liens. He then released his mortgage and filed his deed for record, without making any examination for judgment liens in the office of the clerk of the district court of the county. It afterwards developed that, at the time the mortgage was released and the deed filed for record, there was a judgment lien in favor of defendant Ryan and against defendant Bouck on record in the office of the clerk of the district court. It was for the purpose of having the mortgage reinstated, and the release canceled, and this judgment lien in favor of defendant Ryan declared a subsequent and junior incumbrance, that this action was instituted. The only material difference in the testimony adduced at the last hearing and that reviewed on the former appeal is that, at the last hearing of the cause, the court excluded all evidence offered tending to show that defendant Ryan had stated to plaintiff that he had no other lien against the land of defendant Bouck, except the mortgage which he transferred to plaintiff. It was for lack of this testimony and a finding thereon that the cause was reversed at the first hearing; and the evidence offered on this question at the last hearing was excluded by the trial court on the ground that it was a conversation with a dead man. On appeal we cannot examine any errors of the trial court in the admission or exclusion of testimony, but rather try the case *de novo* on the testimony admitted. Under this view,

we cannot see how we can avoid the rule of the law of the case as determined between the parties on the first hearing in this court as now controlling this action. It is true that at the last trial plaintiff, under the allegation of his amended petition, introduced evidence tending to show that defendant Bouck told him, plaintiff, when he delivered the deed to him, that there was no other liens that he knew of against the property, except the mortgage; but the evidence shows that plaintiff did not rely on this representation alone; but that, on the advice of one Kearney, he went to the county seat of the county to have an examination made for liens against the property, and that he did make a partial but incomplete examination of the records for such information. At the former hearing (61 Neb. 874), we said: "One who, through culpable inertness, fails to make inquiry when it is his duty to do so, is not in a position to have a release of a mortgage canceled on the ground of mistake." We are therefore of the opinion that the judgment of the trial court on the evidence admitted is in strict conformity with the law of this case as established on the first hearing in this court; and we recommend that it be adhered to and the judgment of the trial court affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the trial court is

AFFIRMED.

HUMPHREY HARDWARE COMPANY V. CHARLES M. HERRICK.*

FILED DECEMBER 21, 1904. No. 13,673.

1. **Promissory Note: ALTERATION.** The alteration of a negotiable promissory note, after delivery, by filling in blanks left therein, where there is nothing on the face of the note to indicate such

* Rehearing denied. See opinion, p. 881, *post*.

alteration, will not invalidate the note in the hands of a *bona fide* endorsee, for value, before maturity, and without notice of such change.

2. **Negligence:** EQUITY. If the negligence of one influences and induces an act whereby an innocent man is injured, the culpable party must sustain the loss. *Yocum v. Smith*, 63 Ill. 321, followed and approved.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

C. O. Whedon, for plaintiff in error.

Wilson & Brown, contra.

OLDHAM, C.

This was a suit by an innocent holder, for value, of a promissory note executed by the Humphrey Hardware Company, a copartnership, for $2,500, due 90 days after date, and bearing interest at the rate of 10 per cent. The defense interposed was that the note had been fraudulently altered by the payee by inserting in the blank spaces the rate and date of interest, and place of payment. It was admitted that the note was properly executed and delivered by the defendant, Humphrey Hardware Company, to Francis B. Chapman, the payee named therein. It was admitted that the note was written by the payee, and that the blanks were also filled by him, so that the note stood fair on its face at the time it was purchased by the plaintiff in the court below. There was a direct conflict in the testimony of Chapman, the payee, and Wheeler, the secretary and treasurer of the defendant company, as to whether the blanks in the note were filled before or after the delivery of the note to the payee. It was clearly established, however, that when the note was negotiated the blanks had all been filled, and that the written portion of the note and the blanks for rate of interest, date of interest, and place of payment were all in the same handwriting. On issues thus joined, there was a trial to a jury in the court below,

a verdict for plaintiff, and defendant brings error to this court.

The facts clearly proved surrounding the execution and delivery of the note were that Chapman, the payee named in the note, was the business manager of defendant company; that the company was in need of money, and Chapman offered to advance $2,500 for the use of the company if defendant would give him a note for such sum. The company accepted the proposition, and directed the execution of a note, which was accordingly done by the secretary and treasurer of the company. That on the execution and delivery of the note the payee, Chapman, took the note to the Columbia National Bank and negotiated it as collateral security to his own note for the purpose of procuring the money, which was accordingly done, and the money was thereupon turned over to the defendant company. The only conflict in the testimony is as to when the three blanks in the note were filled, whether before its delivery to Chapman or after; however, there is no conflict in the testimony, which clearly establishes that the blanks had all been filled before the note was negotiated. The trial court, after allowing the witnesses to go fully into the entire transaction leading up to the execution and delivery of the note, submitted the cause to the jury on an instruction which told it, in substance, that, if the jurors believed from the evidence that the alteration in the rate and the time of drawing interest was made after the delivery of the note by the defendant company to the payee, without the knowledge or consent of the defendant, then they should find for the defendant. This instruction, we think, was all if not more than defendant was entitled to under the evidence contained in the record.

It seems to be well supported by the authorities that the alteration of a promissory note, after delivery, by filling the blanks left therein, where there is nothing on the face of the note to suggest an alteration, will not invalidate the note in the hands of a *bona fide* endorsee, for value, before maturity, and without notice of such alteration. The rea-

son of this rule is that, where the maker of a note signs it and delivers it to the payee, with blank spaces in the note for the rate of interest, the time of maturity, or the place of payment, he will, in a contest with an innocent purchaser of the paper, before maturity, and for value, be held to have authorized the payee to fill in the blank spaces, unless the paper on its face bears evidence of mutilation or alteration. Or, as was said by the supreme court of Illinois, in the case of *Yocum v. Smith*, 63 Ill. 321:

"If the note had been altered, the maker has acted with too gross carelessness to be entitled to protection. The purchaser is entirely innocent, and not even a suspicion of his good faith is created—nothing to show that he had any notice of anything wrong. The maker placed it in the power of another to do an injury, and if any loss results, he must suffer who is the cause of it. If the negligence of one influences and induces an act whereby an innocent man is injured, the culpable party must sustain the loss."

Under this view of the case, no other judgment than that rendered in the court below could have been sustained either under the law, the evidence or the conscience of the transaction, and we therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on motion for rehearing was filed March 23, 1905. *Motion overruled:*

PER CURIAM:

Conceding all that is claimed by the plaintiff in error with reference to the alleged alteration of the instrument sued on, it would not be a material alteration in the sense

that the instrument would be void in the hands of a good-faith purchaser, for value, before maturity. The alleged alteration consisted only in filling the blanks in the note sued on by inserting therein the rate of interest, the date from which interest was to begin to run, and the place of payment. The note was written by the payee, and the blanks filled at the time or immediately after its execution, and before its negotiation. The right of the holder to fill these blanks is under an implied authority given by the maker, and, when the note has passed into the hands of an innocent third party, this implication of authority becomes conclusive, and the instrument is a valid and enforceable one against the maker. This rule is abundantly supported by the authorities collated in a monographic note to *Burgess & Co. v. Blake,* 128 Ala. 105, 86 Am. St. Rep., note 9, p. 107.

In *Hurlbut v. Hall,* 39 Neb. 889, it is not made clearly to appear whether the insertion of the rate of interest was in a blank left for that purpose when the note was delivered, or whether it was by an interlineation which would be apparent upon the face of the note. If the note is complete upon its face when it is delivered, and material matters are inserted in the note thereafter, such additions to the note would constitute an alteration, although it was not apparent from an inspection of the note itself that the additions thereto had been made after the delivery of the note.

The motion for a rehearing is denied.

MOTION OVERRULED.

GEORGE W. CLARK V. INTERSTATE INDEPENDENT TELEPHONE COMPANY.

FILED DECEMBER 21, 1904. No. 13,680.

1. Cities: FRANCHISE: INJUNCTION. A taxpayer of a city cannot maintain a suit to prevent the city from granting a franchise to a telephone company, unless the franchise constitutes such a wrongful squandering or surrendering of the money or property of the city that taxation will be increased thereby.
2. Franchise: FRAUD: REMEDY. The remedy to set aside a franchise irregularly or fraudulently granted, where the party to whom it has been granted is in the exercise of the privileges it confers, is by *quo warranto* at the suit of the state, and not by an equitable action at the suit of private parties.

ERROR to the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

W. W. Morsman, for plaintiff in error.

W. C. Lambert and *T. J. Mahoney, contra.*

OLDHAM, C.

Plaintiff as a taxpayer in the city of South Omaha brought this action for the purpose of having a franchise ordinance granted to the defendant by the mayor and council of the city of South Omaha declared void, and to have defendant restrained from proceeding under its franchise and occupying the public streets and thoroughfares of the city in the construction and installation of its telephone system. The petition is carefully drawn and quite lengthy, setting up numerous alleged defects in the proceedings of the mayor and council, both in the passage of the ordinance, and in the notice and conduct of a special election called for the purpose of submitting such proposition to the voters of the city. Defendant interposed a demurrer to plaintiff's petition, which was sustained by the trial court; and plaintiff refusing to further plead, his petition was dismissed, and he brings error to this court.

There is no claim in the petition that any of the lines of the defendant company, or any poles erected in the construction of its lines, pass over, upon or near any streets upon which plaintiff's property abuts; or, in other words, there is no claim of any special injury to plaintiff or his property, which would not be shared by every other taxpayer of the city; nor is it alleged that any tax has been levied or any contract entered into by the city with the defendant company which would entail any liability against the taxpayers of the city. On the contrary, it clearly appears from the allegations of the petition that an annuity of $100 a year for the first five years of the franchise, and of $200 a year for the remaining five years, was exacted by the city council from the defendant company as a condition of the granting of the franchise for a period of 10 years. The ordinance alleged against in the petition makes no attempt to grant an exclusive franchise for the purposes therein specified to the defendant company, so that, if plaintiff has any right simply as a taxpayer to maintain this cause of action, it must be founded either on the proposition that the mayor and council of the city are without any original right or authority to grant the franchise under the charter and ordinances of the city, and that plaintiff and those for whom he sues will be injured by such grant, or that the franchise so granted is a property right held in trust for all the taxpayers of the city, which has been illegally dissipated by the ordinance alleged against. On the first proposition it is conceded and plainly made to appear by the charter and ordinances of the city that the mayor and council, under proper proceedings, had and have the right to grant the franchise. It is claimed, however, by the learned counsel for plaintiff in error, that the franchise right granted by the ordinances is the property of the city, which has been illegally disposed of by the ordinance alleged against. By the law governing the city of South Omaha (Laws, 1901, ch. 17, sec. 172), it is provided as follows:

"No new franchise shall hereafter be granted or any

extension or franchises heretofore granted, be lawful, unless an annuity to the city be provided, based upon either a fixed reasonable amount per year or a percentage of the gross earnings of such franchise."

Now, it is clear from the language of this statute that a sound discretion was intended to be reposed in the mayor and council of the city in determining the amount of the annuity to be required, and that the only limits bounding this discretion are that it must be "reasonable." There is no contention that the amount fixed for the annuity in the ordinance alleged against is unreasonable, or that it is a less amount than should have been exacted; but the contention is that, as the ordinance and the preliminary proceedings leading up to its adoption and passage were irregular and illegal, it stands as though no annuity whatever had been required. We do not think this position tenable, because it seems clear that the defendant company cannot accept a franchise from the city council providing for the payment of this annuity, and enjoy the benefits and immunities of the franchise, and then deny its liability for the payment of the annuity reserved, even if there had been irregularities in the passage of the ordinance. Consequently, plaintiff as a taxpayer is not threatened with additional liabilities by the passage of the ordinance, but, on the contrary, he will be aided by the amount of the annuity, which must be paid annually as a condition of the exercise of the franchise. Again, the franchise, as before pointed out, is not exclusive. Consequently, the storage basin of the city's franchise rights has not been lowered by this diversion.

It is true that this court has extended to the limits the right conferred upon a taxpayer on his own behalf to enjoin municipal or other public officers from squandering public funds, or entering into unauthorized and illegal contracts, which would by their nature increase the burden of taxation. We have also in proper cases permitted taxpayers to recover public moneys illegally squandered and dissipated by the wrongful acts of public officials; but all

these cases rest on the sound principle that each taxpayer has such an individual and common interest in public funds as to entitle him to maintain an action to prevent their unauthorized appropriation.

It seems to be well established, both on principle and by the authorities, that a private individual suing simply as a taxpayer must show something more than a mere speculative or theoretical wrong, which has resulted or will result from a mere illegal act of a city council, to entitle him to equitable relief. It is not enough that the act alleged against is simply illegal, but it must also appear that the illegal act will result in the invasion or destruction of a distinctive right belonging to the party maintaining the action, or to the body of citizens for whom he sues. Injunction by a taxpayer is not the remedy to test the usurpation of a franchise by a corporation. In *Linden Land Co. v. Milwaukee Electric R. & L. Co.*, 107 Wis. 493, it was held in a most careful and exhaustive opinion, by Winslow, J., that a taxpayer of a city cannot maintain a suit to prevent the city from granting a franchise to a street railway, unless the franchise constitutes such a wrongful squandering or surrendering of the money or property of the city that taxation will be increased thereby. Again, in *Stedman v. City of Berlin*, 97 Wis. 505, 73 N. W. 57, it was held:

"The remedy to set aside a franchise irregularly or fraudulently granted, where the party to whom it has been granted is in the exercise of the privileges it confers, is by *quo warranto* or *scire facias* at the suit of the state, and not by an equitable action at the suit of private parties."

It seems to us that, even if, as contended by plaintiff, the ordinance granting the franchise was illegal and improperly enacted, the proper remedy to determine this question is by the high prerogative writ of *quo warranto*, and not by an injunction at the suit of a private citizen and taxpayer to restrain the exercise of the franchise. 1 Clark and Marshall, Private Corporations, 207; *People v. Utica Ins. Co.*, 8 Am. Dec. 243; 2 Dillon, Municipal Cor-

porations (4th ed.), sec. 844. We therefore conclude that the learned trial judge was right in sustaining the demurrer to plaintiff's petition, and we recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GEORGE P. COLLYER v. LATHAM DAVIS.

FILED DECEMBER 21, 1904. No. 13,684.

1. **Sale of Real Estate: STATUTE OF FRAUDS.** It is not necessary that a memorandum, signed by the grantor, sufficient to evidence a sale of real estate, should all be contained in a single letter or communication; but if the contract can be ascertained from the entire correspondence between the parties, or from two or more separate papers referring manifestly to the same subject, without the aid of oral evidence, it will be a sufficient memorandum within the meaning of the statute of frauds.

2. **Memorandum.** While an undelivered deed properly executed and placed in the hands of vendor's agent is not, standing alone, a sufficient written memorandum to evidence a contract of sale of real estate, yet it does not follow that such undelivered deed, submitted to the grantee for inspection, may not be considered for the purpose of aiding an imperfect description in another written memorandum signed by the vendor.

3. **Evidence** examined, and *held* to show a sufficient memorandum in writing signed by the vendor to take a contract of sale of real estate without the ban of the statute of frauds.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Reversed.*

Smyth & Smith, for plaintiff in error.

I. E. Congdon, contra.

OLDHAM, C.

This was an action brought by plaintiff, George P. Collyer, in the district court for Douglas county, Nebraska, against defendant, Latham Davis, for damages for the alleged breach of a contract for the sale and purchase of a tract of land called "The Glebe," situated in the state of Virginia. After the evidence was presented, defendant moved the court to direct the jury to return a verdict in his favor, on the theory that the evidence failed to show that plaintiff, Collyer, as vendor, had ever made a note or memorandum in writing which would evidence the alleged contract of sale. The court accordingly directed a verdict as requested by defendant. A motion for a new trial was filed by plaintiff and overruled, and judgment was entered upon the verdict, and to reverse this judgment plaintiff brings error to this court.

The only question to be determined is as to whether the evidence introduced by plaintiff in the court below is sufficient to show a memorandum in writing signed by the vendor of the lands, or his agents authorized by him in writing to subscribe to such agreement. A contract for the sale of lands is governed by the provisions of sections 5 and 25, chapter 32, Compiled Statutes, 1903 (Annotated Statutes, 5954, 5974), which are as follows:

"Sec. 5. Every contract for the leasing for a longer period than one year * * * or for the sale of any lands, or any interest in lands shall be void unless the contract, or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made."

"Sec. 25. Every instrument required by any of the provisions of this chapter to be subscribed by any party may be subscribed by his agent, thereunto authorized by writing."

The land which formed the subject of this alleged contract is, as above stated, located in Westmoreland county, Virginia. The plaintiff is a resident of Virginia, and the

defendant, at the time of the negotiations, was a resident of the state of Nebraska. In April, 1903, defendant Davis, accompanied by one of his employees named McDermott, went to Virginia for the purpose of purchasing land. At the village of Hague, in the state of Virginia, they met Messrs. Murphy and Mayo, who were real estate agents of the village and county. The lands in dispute had been placed in charge of these agents by plaintiff Collyer, under a contract in writing, signed and sealed by the plaintiff, which, after fixing the terms and price of the land, contained the following condition: "I hereby authorize Murphy and Mayo to sell my tract of land in Westmoreland county, containing 400 acres, and I agree to pay them 10 per cent. commission if they sell or are the means of selling or exchanging it. * * * If an imperfect title prevents the consummation of the sale I agree to pay the commission." The terms named in the contract were $8,000, payable one-fourth down and the remainder in one, two and three years. After defendant Davis and his employee had examined the land, according to plaintiff's testimony, Davis offered $5,500 for the land, one-third down, one-third in one year and one-third in two years. This offer was made on April 17, 1903, and was communicated to plaintiff by his agents Murphy & Mayo in the following telegram:

"*George P. Collyer, Stanton, Va.*

"Have offer $5,500 for 'Glebe.' One-third cash, balance in one and two years. Answer at once.

"(Sig.) MURPHY & MAYO."

On the following day plaintiff wired Murphy & Mayo as follows:

"*Murphy & Mayo, Hague, Va.*

"Will take $5,000 net to me.

"(Sig.) GEORGE P. COLLYER."

On the same day Collyer wrote to Murphy & Mayo as follows:

"*Murphy & Mayo, Hague, Va.*

"GENTLEMEN: Your telegram of this date, stating that you had offer of $5,500 for 'Glebe,' just received. I wired that I will take $5,000 net to myself, leaving $500 for your commission. I am not anxious to sell the place, because I bought it for a future home and also believe I can get more money for it in a year or two. So it makes very little difference to me whether you close out the place at $5,500 or not.

"Thanking you for your kindness,

"Yours very truly, GEORGE P. COLLYER."

On receipt of this communication Murphy & Mayo, on the 19th of April, wrote to plaintiff Collyer, that they had completed the sale with the defendant Davis, who had just left for the state of Nebraska, leaving Mr. McDermott, according to plaintiff's testimony, to complete the arrangements for the transfer of the place, and take possession for him as soon as the papers have been exchanged and the terms of the contract completed. At the same time Murphy & Mayo wrote Collyer this last letter, they wired to defendant Davis, at Omaha, as follows:

"*Latham Davis, Omaha, Neb.*

"Mr. Collyer accepted your offer. I am glad to say you can send check to McDermott. We will search title and make papers. MURPHY & MAYO."

On the 30th of April, defendant Davis wrote to Murphy & Mayo as follows:

"Have been up to my ranch in Boone county and on my return yesterday found yours of the 19th inst. Please have your bankers in Washington or Alexandria forward abstract, deed and mortgage of the 400 acres Glebe tract to the First National Bank, or their correspondent in Omaha, allowing bank here to have attorney investigate papers before payment of money and delivery of notes," etc. At the bottom of this letter was marked "Over" and the following memorandum was placed on the back of the

letter: "Cash $1,833.34, note one year $1,833.33, note two years $1,833.33, total $5,500."

On May 8, Murphy & Mayo wired defendant at Omaha:

"*Latham Davis, Omaha, Neb.*

"Have closed deal with Collyer according to terms of your letter of April 30. MURPHY & MAYO."

Following all this correspondence Murphy & Mayo procured a deed to the premises, duly executed and acknowledged by the plaintiff, and also had drawn up two notes, according to the terms of the agreement, and a sight draft of five days for the one-third cash payment, and inclosed these papers with a memorandum of the title of the land, and transmitted them through the bank at Alexandria, Virginia, to the First National Bank of Omaha, as directed by defendant Davis, for his inspection, and with directions that the deed should be delivered on payment of the draft and the execution of the notes and deed of trust, and that the notes and deed of trust should be sent back to the bank at Alexandria, Virginia. When the deed, draft, notes and mortgage were received at the First National Bank of Omaha, certain objections were interposed to the chain of title and to the form of security by defendant's attorney, and the objections were sent back through the mail to Murphy & Mayo. Murphy & Mayo then wrote, practically offering to comply with all the requirements demanded. But this offer was refused by defendant, who declined any further negotiations with reference to the property.

It is conceded that, unless the contract falls within the ban of the statute of frauds, the question as to whether plaintiff had complied with the conditions of the contract or not was one of fact, which under plaintiff's testimony should have been submitted to a jury. So that the only question for us to determine is whether or not the correspondence above set out constitutes a sufficient memorandum in writing, signed by plaintiff, or an agent authorized

under the terms of the statute to subscribe to such memorandum for him. It is conceded that Murphy & Mayo under the written contract with plaintiff had, when the negotiations were begun, proper and full authority to contract for the sale of the land in dispute on the terms specified in their agreement with the plaintiff. It is also apparent that they had by the instrument then in their possession no other authority, so that if, when the offer of $5,500 was made, they had entered into a contract with the defendant for a sale of the premises on the offer then made, it would have been unauthorized, and a memorandum signed by them would have contained no probative force under the statute of frauds. But when they wired the terms of this offer to their principal, he had a right to change the terms of the written contract, and this, we think, he did by his telegram and the letter explanatory of the telegram which followed it. There is no contention as to the genuineness of any letter or telegram offered by the plaintiff, and they are connected in such a manner, under the proof offered, that each communication refers in apt terms to some other, so that the entire correspondence is identified by its own contents, and not by oral testimony. For instance, the letter following Collyer's answer to the telegram of Murphy & Mayo explains what he means by having $5,000 net from the sale of the lands, and plainly authorizes the sale, provided his agents are willing to take $500 as their commission.

It is urged by counsel for defendant in error that the letter from Collyer to his agents did not specifically set forth the terms of the sale on which he was willing to accept $5,000 net for the land, and he concedes that, had this letter specifically stated that he would take $5,000, payable one-third in cash, one-third in one year and one-third in two years, it would have authorized them to complete the sale on these terms. The trouble with this contention is that defendant in error seems to be impressed with the idea that a memorandum in writing, signed by the vendor, necessary to establish proof of a sale of real

estate, must all be contained in a single letter or other written communication. This is not the rule. If the terms of the contract can be collected from the correspondence of the parties, or from two or more separate papers referring manifestly to the same subject, it will be a sufficient memorandum within the meaning of the statute of frauds. All writings executed between the same parties, at the same time, and about the same subject, must be held as one instrument and construed together. *Perry v. Holden,* 22 Pick. (Mass.) 269; *Chickering v. Lovejoy,* 13 Mass. 51; *Carey v. Rawson,* 8 Mass. 159; *Stow v. Tifft,* 15 Johns. (N. Y.) *463. We think, therefore, that the letter, read in connection with the telegram to which it replied, was a sufficient memorandum to authorize the agents of plaintiff to proceed with the sale on the terms stated in their telegram. And, again, while it is true that in this state we have held that an undelivered deed, signed and executed by the grantor and placed in the hands of his agent, is not, when standing alone, a sufficient memorandum to evidence a contract of the sale of real estate (*Wier v. Batdorf,* 24 Neb. 83), yet, in the very decision in which this rule is announced, the case of *Thayer v. Luce,* 22 Ohio St. 62, is cited with approval, and MAXWELL, J., in delivering the opinion, said:

"If the facts in the case under consideration brought it within those of the Ohio case, we would have no hesitancy in enforcing the contract."

In *Thayer v. Luce, supra,* the facts were that the vendors, Luce and Fuller, had made an imperfect memorandum of a contract for the sale of real estate with the plaintiff, who was asking for specific performance. The memorandum contained no description of the property to be sold, but subsequently the grantors executed a deed fully describing the property and the terms of the sale, and submitted it to the grantee for inspection. After the deed was inspected by the grantee it was returned to grantors to await the completion of the sale, which the grantors subsequently refused to consummate, and, as an answer

to a suit for specific performance, they pleaded the statute of frauds. In disposing of the question, McIlvain, J., speaking for the court, said, among other things:

"That the memorandum alone is insufficient for that purpose is clear. The absence of necessary description of the subject matter of the contract is a fatal defect. The deed, however, supplies the defects in the memorandum, and taken together (if we may so construe them), we find in the two instruments the terms of a full and complete contract. That several writings, though executed at different times, may be construed together, for the purpose of ascertaining the terms of a contract and for the purpose of taking an action founded thereon out of the operation of the statute of frauds, is settled." Citing *Allen v. Bennet,* 3 Taunt. (Eng.) 169; *Jackson v. Lowe & Lynam,* 1 Bing. 9; *Owen v. Thomas,* 3 Myl. & K. 353; *Salmon Falls Mfg. Co. v. Goddard,* 14 How. (U. S.) 446; *Tallman v. Franklin,* 14 N. Y. 584; *Pollock v. Brainard,* 26 Fed. 732. Further on in the opinion, after admitting as an abstract proposition that an undelivered deed is not sufficient evidence of a subsisting contract between the parties, the opinion says:

"We think, however, that a distinction may well be taken between an instrument of writing in the usual form of a deed of conveyance which has never been delivered for any purpose, or which has been delivered for the purpose of transferring title, and a like instrument which has been delivered merely as an evidence of an executory contract, or as evidence in part of such contract. The distinction exists in the difference of intention with which the acts were performed, and the true intent in either case must be determined by the circumstances of the act, by the *res gestæ.* It is perfectly clear that such an instrument delivered by the apparent grantor to the apparent grantee under such circumstances as repel the conclusion that a transfer of title was intended, is inoperative as a conveyance. And it appears to me to be just as clear that the like delivery of such an instrument, under circumstances

which show an intention to make a proposition to sell the property therein described on the terms therein written, is a legitimate and proper way to negotiate a contract of sale, and instantly that the terms thus proposed are accepted, the contract of bargain and sale is complete—not executed in fact by transfer of title, but executory and evidenced by writing signed by the vendor within the meaning of the statute. Nor does it matter in whose possession the instrument may afterward be placed. The executory contract is subsisting, and will continue to be valid and binding upon the parties until mutually rescinded or consummated. Such is the case under consideration. The deed was signed by the defendant below and delivered to the plaintiffs, not as a conveyance of title, but as an evidence of their executory contract of bargain and sale."

If this rule so announced and quoted with approval by MAXWELL, J., in *Wier v. Batdorf, supra,* should be applied to the case at bar, it would certainly determine the question that the delivery of the deed, notes and mortgage, and draft accompanying it in escrow to the First National Bank of Omaha, for the inspection and approval of the defendant, would certainly aid the letter written by plaintiff to his agents as to the terms on which he authorized them to contract for the sale of his lands. We are therefore of opinion that the learned trial court was in error in holding that the contract sued upon was not evidenced by any memorandum in writing signed by the grantor or his duly authorized agent, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

DANIEL C. BROWN ET AL. V. GARDNER COWLES.

FILED DECEMBER 21, 1904. No. 13,634.

Contract: BREACH: DAMAGES. The rule is elementary that in an action for damages for breach of contract such damages only may be recovered as are the probable, direct and proximate consequences of the wrong complained of, and such as may fairly be supposed to have been within the contemplation of the parties at the time of the making of the contract as a probable result of the breach of the same.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed upon condition.*

George A. Adams and *J. E. Philpott,* for plaintiffs in error.

F. H. Woods, L. R. Ewart and *H. V. Failor, contra.*

LETTON, C.

This action was brought by defendant in error, Gardner Cowles, as plaintiff, against James M. Neff as principal, and the other defendants as sureties, upon an obligation given to secure the faithful performance by Neff of a contract made between Cowles and him for carrying the United States mail, as a subcontractor, between the city of Lincoln and the post office at Lancaster. The petition sets up the contract, and alleges a breach of the same by Neff's refusing to further carry the mail; and pleads that the plaintiff was put to great expense and damage in procuring another person to complete the contract. A general denial was filed by the defendant; the case tried to the court without the intervention of a jury, and a judgment rendered in favor of the plaintiff for the sum of $77.40. No attack was made upon the petition before the trial, and it is now urged that it does not state a cause of action.

1. We think, however, it sufficiently sets forth the contract, its breach, and the items of damage which the plain-

tiff claims he suffered by reason of the failure of the defendant to carry out the contract.

2. It is objected that the court erred in the amount of recovery. The plaintiff asks judgment for $110.40, the items of the claim being as follows: Hiring one Poppleton to obtain a man to complete the contract $30; Poppleton's car fare from Algona, Iowa, to Lincoln, Nebraska, $20; increased salary for man to complete the contract for 2½ years $45; Poppleton's hotel expenses and street car fare $10; other expenses in carrying mail, $5.10.

The rule is elementary that in an action for damages for breach of contract such damages only may be recovered as are the probable, direct and proximate consequences of the wrong complained of, and such as may fairly be supposed to have been within the contemplation of the parties at the time of the making of the contract as a probable result of the breach of the same. It requires no argument to show that the hiring of a man in the state of Iowa, sending him to Nebraska, and paying his wages, hotel and other expenses, could not reasonably be within the contemplation of the parties as the result of a failure of Neff to perform the contract. If Neff could be charged with railroad fare from Iowa, he could with equal propriety be charged with railroad fare from New York. There are no extraordinary conditions requiring such expenditures pleaded or proved. Such damages are entirely too remote and cannot be recovered. Whatever excess the plaintiff was compelled to pay in order to procure the services of another person at a reasonable and proper rate to furnish the services which Neff had agreed to perform, and which the plaintiff was bound to perform under his contract with the government, are proper and necessary items of damage which the plaintiff is entitled to recover in this action.

By its terms the contract terminated on the 30th day of June, 1902. This action was begun on the 21st day of March, 1901. The plaintiff is not entitled to recover in this action for damages which accrued after the action was

brought. *Wittenberg v. Mollyneaux,* 59 Neb. 203. Neff refused to carry out the agreement on the 20th day of December, 1899. The plaintiff therefore would be entitled to recover the increased compensation which he was required to pay over and above the amount of the contract from the 20th day of December, 1899, when Neff refused to perform, until the 21st day of March, 1901, when this action was commenced. At the rate of $18 a year this amounts to $22.50. There is evidence that between the time that Neff refused to further carry on the contract and the time that a new contract was made with another subcontractor the plaintiff was required to pay the sum of $5.40 to other parties for carrying the mail, in excess of the amount which he had agreed to pay Neff. The plaintiff seems to be entitled to the items of $22.50 and $5.40 paid in excess of the contract price, with interest at 7 per cent. from the 20th day of December, making a total of $37.55.

If the defendant in error remits the sum of $39.85 the judgment of the district court will be affirmed: Failing to do so, the cause will be reversed and remanded for a new trial.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, if the defendant in error remits the sum of $39.85 within 30 days the judgment of the district court is affirmed. Failing to do so, the judgment is reversed and the cause remanded for a new trial.

AFFIRMED UPON CONDITION.

ELIZABETH C. O'NEAL, ADMINISTRATRIX, APPELLEE, V. BELLEVUE IMPROVEMENT COMPANY, APPELLANT, IMPLEADED WITH AMELIA P. LOWRIE ET AL., APPELLEES.

FILED DECEMBER 21, 1904. No. 13,668.

1. **Appeal: REVIEW.** It is the settled doctrine of this court that in reviewing a judgment of the district court upon appeal this court will only consider whether or not the pleadings and the evidence are sufficient to justify the judgment of the district court.

2. ———: ———. Upon an examination of the pleadings and the evidence, *held*, that they fully support the judgment of the district court.

APPEAL from the district court for Sarpy county: GEORGE A. DAY, JUDGE. *Affirmed.*

Harry Z. Wedgwood, for appellant.

William R. Patrick, contra.

LETTON, C.

This is an appeal from a judgment of the district court for Sarpy county, quieting title in the appellee to certain lots in the village of Bellevue. The action was brought by Elizabeth C. O'Neal, administratrix, as plaintiff, against the appellant and others as defendants. Before the trial a petition in intervention was filed by the appellees, to which answers were filed by the appellant. A demurrer to the plaintiff's petition was sustained, and the cause was tried upon the issues raised by the petition in intervention and the answers thereto. A number of errors in the proceedings leading up to the trial have been urged as grounds for reversal by appellant, but it is the settled doctrine of this court that, in reviewing a judgment of the district court upon appeal, this court will only consider whether or not the facts as shown by the pleadings and the evidence are sufficient to justify the judgment of the district court. *McNaughton v. Burke*, 63 Neb. 704, and cases cited. The

petition in intervention alleges substantially that the interveners are the only heirs of Hugh M. O'Neal, deceased; that at the time of his death he was the owner in fee simple of the real estate in controversy; that he entered into the possession of the same in 1889, and was in the open, notorious, continuous, exclusive and adverse possession thereof, claiming title thereto, from that time until the time of his death in February, 1900. The petition further sets out that the appellants each claim some title or interest in the premises by virtue of certain tax deeds and other conveyances described therein, and alleges that each and all of said deeds are void, and that they constitute clouds upon the intereveners' title.

The petition states sufficient facts to constitute a cause of action in *quia timet*. The testimony offered on the part of the interveners fully supports the allegations of the petition. No evidence was offered on behalf of appellant.

We are of the opinion that the petition and the evidence fully support the judgment of the district court, and we recommend that it be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. MURTY D. O'DONNELL, BY MARY O'DONNELL, HIS NEXT FRIEND.

FILED DECEMBER 21, 1904. No. 13,671.

1. **Negligence:** DEMURRER: EVIDENCE. A general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant. *Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456.

2. Petition: AMENDMENT: CAUSE OF ACTION. Original petition and amended petition examined and compared, and *held*, that the amended petition does not state a new or different cause of action from that set forth in the original petition.

ERROR to the district court for Lancaster county. LINCOLN FROST, JUDGE. *Affirmed.*

Billingsley & Greene, R. H. Hagelin, M. A. Low, W. F. Evans and *Paul E. Walker,* for plaintiff in error.

T. J. Doyle and *George A. Adams, contra.*

LETTON, C.

This action was brought by Murty D. O'Donnell, by his next friend, Mary O'Donnell, against the Chicago, Rock Island & Pacific Railway Company, to recover damages for injuries alleged to have been inflicted upon him while passing along Vine street in the city of Lincoln on his way home from school. For a statement of the case see *O'Donnell v. Chicago, R. I. & P. R. Co.,* 65 Neb. 612. After a judgment for the defendant error proceedings were prosecuted to this court, whereupon the cause was reversed and remanded to the district court. After the cause was remanded the plaintiff filed an amended petition, to which the defendant answered. Plaintiff filed a reply, the cause was again tried, judgment rendered for the plaintiff, a motion for a new trial filed and overruled, and the defendant now prosecutes error to this court.

There is only one ground of error relied upon and discussed in the briefs, and that is that the amended petition sets up a new and different cause of action from that alleged in the original petition, and that this new cause of action is barred by the statute of limitations. The essential parts of the first petition necessary to consider to determine this question are, that the defendant, on the 18th day of November, 1898, stopped a large freight train across Vine street between 18th and

19th streets, "and kept and wrongfully, carelessly and negligently held said train across said street, blockading all passageways along said street and the sidewalks along either side thereof, and for a long distance each way north and south therefrom, for an unusually long period of time, to wit, one-half hour and more, and that during all of the said time that said train of cars was so wrongfully, carelessly and negligently kept by the defendant across said street and obstructing the passage over and along the same and the sidewalks on either side thereof, and for a long distance each way north and south therefrom, there was no way for persons to go along said street or the sidewalks, or to in any way travel said street at said point, or across said railway track at said point, except to go between the cars composing said train. That the point or place where said railway track and said Vine street crossed each other at said time was in and near to a thickly settled part of the city of Lincoln, Nebraska, and there was at said time much travel over, upon and along said Vine street at said point and place, and the defendant at said time, and by so wrongfully, carelessly and negligently placing its said train of cars upon its said railway track, and across said Vine street for an unreasonable length of time, obstructed and prevented all travel along said Vine street at that time. That the plaintiff, Murty D. O'Donnell, was passing and traveling along said street on said day, and in the afternoon thereof, on his way home from school, and it became necessary for him to pass along said street at the point where said railway train was so wrongfully, carelessly and negligently by defendant kept across said street and obstructing the same, and in attempting to cross the said track, without any fault of his, and by and through the negligence of the defendant and its employees, he was violently and forcibly thrown from said train upon the ground and railway track and under the wheels of the car of the same, and the said train of cars and the wheels thereof passed upon and over the leg of the plaintiff, seriously lacerating, injuring and damaging the

same. * * * That by reason of said injury so received by the plaintiff, Murty D. O'Donnell, and by and through the negligence of the defendant and its employees, the plaintiff, Murty D. O'Donnell, has become and is permanently and seriously injured in the loss of his limb, and thereby made a cripple for life, that by reason of said injury so wrongfully, carelessly and negligently caused by the defendant, and because of said suffering and pain so likewise caused by the defendant, the plaintiff Murty D. O'Donnell, has been damaged," etc.

The allegations in the original and amended petitions, so far as the original petition is copied above, are substantially alike, though the language of the pleader is not exactly the same *verbatim et literatim,* and no question is raised as to their identity of allegation thus far.

In the amended petition, however, the following additional paragraph is inserted. "The plaintiff further avers that, at the time the plaintiff, Murty D. O'Donnell, was crossing said railroad track along said Vine street, which was so obstructed by the defendant, as aforesaid, on account of said obstruction remaining on said street for said unusual length of time, it became necessary for the plaintiff to go upon said cars and to cross the same in so doing; and while the plaintiff was thus upon said cars for the purpose of crossing said track, the defendant, through its engineer operating the engine which was hauling this train of cars, discovered the said plaintiff, Murty D. O'Donnell, and knew that he was a mere child of tender years, and defendant fully realized the perilous condition of said Murty D. O'Donnell, and the great peril and danger to said plaintiff, both of life and limb, by moving said train and continuing to move the same, while said plaintiff was in said perilous condition, through no fault or negligence upon the part of plaintiff, the defendant, notwithstanding its full knowledge of said danger to the plaintiff, and notwithstanding the fact that it had the power to instantly stop said train of cars and avert any possible injury to the plaintiff, continued to carelessly, negligently

and with wanton disregard for the safety of plaintiff to move said train of cars, thereby causing the injury, as hereinbefore described, to the plaintiff."

It is earnestly urged by the plaintiff in error that the allegations in the fourth paragraph of the amended petition thus set forth constitute a new and different cause of action from that contained in the original petition. It is argued that in the original petition there was no general allegation of negligence; that it was not based upon the negligence or improper conduct of the employees of the railway company, but rested entirely upon the allegation that the railway company obstructed a public street for an unwarranted length of time, compelling the plaintiff to pass between the cars, whereby he received the injuries for which he sought to recover, and that, if a new cause of action is stated, sufficient time has elapsed to bar a recovery. The plaintiff upon the other hand contends that the additional matter set forth in the amended petition is merely an amplification and more specific statement of the general allegations of negligence set forth in the original petition, and that under the pleadings in the original cause he was entitled to prove and did prove all the facts alleged in the amended petition.

The original petition sets forth in detail the blockading of the street by the train. It then alleges that "in attempting to cross the said track, without any fault of his, and *by and through the negligence of the defendant and its employees, he was violently and forcibly thrown from said train* upon the ground and railway track and under the wheels of the car," and further alleges "that by reason of said injury so received by the plaintiff, Murty D. O'Donnell, and *by* and *through* the *negligence* of the *defendant and its employees,* the plaintiff has become and is permanently and seriously injured," etc. Under these general allegations of the negligence of the defendant and its employees, any negligence upon the part of the employees of the defendant by reason of which the plaintiff was violently and forcibly thrown from the train could prop-

erly have been admitted in evidence. It is the settled doctrine of this court that a general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant. *Omaha & R. V. R. Co. v. Wright,* 49 Neb. 456; *Omaha & R. V. R. Co. v. Crow,* 54 Neb. 747. The most specific allegation of negligence in the *Wright* case was "that the said defendant, carelessly and negligently, by its employees and servants, in operating said train ran their said engine and train in, over, and upon said plaintiffs' stock, when by exercising proper care and skill in the management and handling of its engine and train it could have stopped said train long before striking said plaintiffs' stock." The court said: "Wright and others, in their petition in the case at bar, charged the railway company generally with negligence and under these allegations we think that it was competent for them to introduce evidence of the fact, if it was a fact, that the engineer in charge of the train saw, or by the exercise of due care could have seen, the cattle in time to have stopped the train and avoided injuring them. * * * In other words, where a pleader relies upon certain specific acts or omissions as negligence, he is limited to such specific acts or omissions. If he pleads negligence generally, he may introduce evidence of any act or omission which tends to support his pleading."

The gist of the fourth paragraph in the amended petition in this case is that the engineer, after he discovered the perilous condition of the plaintiff, continued to negligently move the train of cars, thereby causing the injury. In connection with this allegation it is important to note that in the opinion rendered upon the former hearing of the case in this court, which opinion was offered in evidence by the defendant, it is said:

"There was no conclusive presumption of negligence on the engineer's part, merely because he saw a boy of eight years jumping on the stirrup and ladder of a freight car going not more than three miles an hour, and jumping off

again, and failed to stop to remove him. Whether such failure to act on the engineer's part was negligence was for the jury to say. The acts complained of in this petition are the leaving of the train upon the crossing, and violently and forcibly throwing the plaintiff from the train, and passing of its wheels over plaintiff's leg, through 'negligence of the defendant and its employees.' *Whatever negligence was connected with these acts,* and *caused* the *injury through them,* was provable, and to be considered." And again: "Instruction 9, as given by the court, told the jury that a child jumping on and off a train would be a trespasser, and this fact, if they found it, should be considered, and would constitute contributory negligence on his part, if they found he was of sufficient age and discretion to be guilty of negligence. It is also stated that if defendant should discover the child in imminent danger, and failed to exercise reasonable care, where such care would have prevented the injury, the child's action would be no defense. The court's instruction submitted the question fully."

It was held therefore that one of the facts which was proper to be proved under the general allegation of negligence in the original petition was that the engineer discovered the plaintiff upon the train and negligently continued to move the same after such discovery, thereby causing, as claimed, the injury of the plaintiff, and that evidence tending to show negligence of this character was properly introduced at the former trial. This is the law of the case and must be applied here.

The plaintiff might have been required by motion at the first trial to have made his petition more definite and certain, and might properly have included therein the specific facts now alleged in the fourth paragraph of the amended petition. He was not required to do so, but did so on his own volition upon the second trial. Such allegations were merely an amplification and expansion of the facts set forth in the first petition, and constitute no change of the cause of action and no new or different

claim. The general allegation of negligence in the form made in the first petition is wide enough to include them. We think it unnecessary to cite any further authority in this matter. The rules which govern the determination of this case are plain and positive. We think it clear that the amended petition is only a more expanded statement of the original one.

We recommend therefore that the judgment of the district court be affirmed.

OLDHAM and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CORA ALLEN V. ARTHUR H. RUSHFORT.

FILED DECEMBER 21, 1904. No. 13,674.

1. **Contract: LIEN: WAIVER.** Where a written contract of sale is made of an entire crop of standing hay at an agreed price per ton, part payment is made, and the purchaser takes possession of the crop, cuts and stacks it, and bales and carries away part of it, the title to the crop passes to him. The fact that the contract provides that the hay is to be paid for before taken from the farm merely gives a lien on the hay for the unpaid purchase money, which may be waived by the seller.
2. **Action: ERROR.** Under the pleadings and evidence in this case, *held*, that the seller waived her lien; that an action for the contract price was properly brought, and that the case should have been submitted to the jury.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Reversed.*

Weaver & Giller, for plaintiff in error.

P. A. Wells, contra.

LETTON, C.

This is an action for the purchase price of a certain crop of timothy hay which it is claimed was sold to the defendant under the following contract of sale: "This agreement, made this 30th day of June, 1902, between Cora Allen and A. H. Rushfort of Omaha, Witnesseth, that the first party has sold to the second party the crop of timothy hay now growing on the northwest quarter of the southeast quarter of section 17, town 16, range 10, for $4.50 per ton net to first party; the hay to be paid for before taken from the farm. The first party has paid $50 cash to bind the bargain. Signed, Cora Allen, Arthur H. Rushfort. Witness, J. W. Kennedy." The petition alleges that when the crop matured the defendant cut and harvested the hay, stacked it upon the land, and subsequently baled a part of it and removed it, but refuses to pay for it. It is further alleged that the crop weighed 100 tons; that it was of the value of $450; that the defendant paid $50 upon the purchase price, and that he has refused to take the balance of the hay, and refused to pay the balance of the price. The defendant admitted the execution of the contract, but alleged that there was a contemporaneous oral agreement by which the hay mentioned should be weighed upon scales situated upon the premises of the plaintiff's mother; that he cut and stacked the hay and took 30,300 pounds, which was weighed upon said scales; that in weighing of the hay the plaintiff fraudulently manipulated the scales so that they did not correctly weigh the hay; that when he complained of this, the plaintiff refused to permit the hay to be weighed on any other scales or to permit the defendant to take any more hay unless weighed upon these scales, and the weights thereby indicated accepted as the correct weights of the hay. He alleges that by this fraud he was prevented by the plaintiff from the further performance of the contract. He further sets out a counterclaim for labor in the harvesting and stacking of 50 tons of hay, which he al-

leges remains on the premises, and for loss of profits occasioned by the plaintiff's preventing him from removing the said 50 tons of hay. The reply was a general denial. At the trial, upon the conclusion of the plaintiff's evidence, the court upon the defendant's motion instructed the jury to return a verdict in favor of the defendant, which was done, and the plaintiff's action was dismissed. From this action of the court the plaintiff has prosecuted error.

The evidence is substantially to the effect that, after the execution of the written contract, the defendant went upon the plaintiff's premises and cut and stacked the hay. After it had been standing in stack about 30 days he took a haypress to the land, and worked at pressing the hay for over a week. He then hauled part of it to the railroad station at Valley for shipment. After he had taken six loads away he told the plaintiff he had taken about 15 tons, while she claimed that about 24 tons had been taken. He then complained about the scales being incorrect, and plaintiff told him not to stop on that account; that he could weigh the hay at Valley at Mr. Whitmore's scales, and she would take Whitmore's word for it. The plaintiff went to see him at Valley, and told him she wanted pay for it. He offered to pay for 21 tons, and upon the plaintiff asking him to put the money in the bank at Valley, he put $50 in the bank. The next morning he went to the farm to get the machine, and refused to take any more hay. After that, in South Omaha, the plaintiff asked him if he would release the contract and pay for one carload, which he refused to do. It will be seen that the plaintiff proved the execution of the contract and a payment upon the same, the cutting and stacking of the hay by the defendant, his removal of a part of the same, and a refusal upon his part to take and pay for the remainder which he had stacked, the only reason being that he was dissatisfied with the weight as given by her scales, but that she told him she would accept the weight from Whitmore's scales or the railroad scales at Valley.

The defendant argues that the petition does not state

a cause of action, and that the evidence failed to prove a cause of action and would not support a verdict. As to the first ground, we think the petition is sufficient. It sets up the contract for the sale of the entire crop, the price, part payment upon the same, the acceptance and removal of a portion of the crop, the number of tons in the crop and the failure to pay for the same. We do not see what is lacking in this petition.

As to the second ground, it is contended that the evidence shows that the contract is executory only. The contract recites that the plaintiff has sold to the defendant the crop of timothy hay, specifies the price and the time of payment, and recites that $50 has been paid upon the same. Further than this, the evidence shows that the defendant took actual and manual possession of the property sold. He expended time and labor upon the same, and changed its condition from that of standing grass to dry hay in stack. The only thing that remained to be done was to ascertain how much the whole crop weighed, and pay the balance of the price. The defendant argues that under such a contract the title did not pass until payment was made. A part payment had been made, however, and subsequently the plaintiff parted with her control over the grass, and the defendant took possession of it, the plaintiff reserving only a right to receive the remaining purchase price upon the removal of the property from her land. The rule contended for by the defendant, that where specific goods are to be weighed, measured or tested, if this is necessary to fix the aggregate sum to be paid, title will not pass until this is done, does not apply where a sale is made of an entire mass, such as in the instant case, but does apply to circumstances where a certain fixed amount is to be separated from a mass; the reason being that in the one case the identity of the goods cannot be ascertained until their separation, but in the other there is no question of identity. The distinction is properly stated in Benjamin, Sales (7th ed.), sec. 346: "The distinction in all these cases does not depend so much upon

what is to be done *as upon the object which is to be effected by it.* If that is specification, the property is not changed; if it is merely to ascertain the total value at designated rates the change of the title is effected." In the instant case the crop of hay was appropriated to the defendant by the contract. He agreed to take it and pay the stipulated price. He paid part of the price, reduced the crop to his own possession, and became entitled to remove the same from the premises as soon as he paid the price for the remainder. The provision as to retention of possession gave the plaintiff a lien on the property, as between her and the defendant, until it was paid for, but she might waive her lien, and the evidence shows that she did waive it by giving him permission to remove the hay and weigh it elsewhere as soon as he complained of her scales. The intention of the parties evidently was to transfer the title to the grass at the time the contract was signed and the $50 paid, subject to the lien provided in the contract, and the court will construe the contract in accordance with their intention and with their subsequent conduct.

For these reasons, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

OLDHAM and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

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6. Sec. 7, art. IX of the constitution, prohibits the legislature from imposing taxes on municipal or other corporations for corporate purposes. *Held*, That a tax sought to be imposed upon fire insurance companies under authority of the legislature is unconstitutional. *Aachen & M. F. Ins. Co. v. City of Omaha*..... 518

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7. An owner is not deprived of his property without due process of law by means of taxation, if he has an opportunity to question the validity of the tax at some stage of the proceedings. *Hacker v. Howe*..... 385
8. The fact that no notice of sale of land for taxes under ch. 76, laws of 1903, is required other than that contained in the act itself does not render it void as taking property without due process of law. *City of Beatrice v. Wright*.... 689
9. The provisions of the act for the sale of land for taxes, ch. 76, laws of 1903, *held* in conflict with sec. 4, art. IX of the constitution, which denies to the legislature power to release or discharge taxes, or to commute the same. *City of Beatrice v. Wright*..... 689
10. The title to ch. 68, laws 1881, "An act to fix a maximum standard of freight charges," etc., contains only one subject. *Chicago, B. & Q. R. Co. v. Anderson*..... 856
11. Secs. 39 and 40, art. I, ch. 77, Comp. St., 1901, providing for the assessment of railroad property for taxation are valid. *Chicago, B. & Q. R. Co. v. Richardson County*..... 482
12. Secs. 39 and 40, art. I, ch. 77, Comp. St., 1901, are not invalid as a taking of property by taxation without due process of law. *State v. Back*..... 402
13. Sec. 592 of the code, limiting the time for commencing proceedings in error, is constitutional. *Chicago, R. I. & P. R. Co. v. Sporer*..... 372
14. Ch. 104, laws of 1899, amending sec. 125, ch. 58 of the criminal code, 1873, is not in conflict with sec. 11, art. III of the constitution. *Moline v. State*..... 361

Contracts. See BONDS, 4.

1. Where plaintiff claims that a certificate of deposit was indorsed to a county attorney under an agreement that he would dismiss a criminal prosecution, a court will not aid him to regain possession of the property. *Johnson v. Owen*, 477
2. The alteration of a written contract by a stranger will not avoid the contract, where the contents as it originally stood can be ascertained. *Colby v. Foxworthy*..... 378

Contribution. See PARTNERSHIP, 1.

Corporations.

1. Corporation *held* to be an instalment investment company under ch. 29, laws 1903, Comp. St., ch. 16, secs. 216-227. *State v. Northwestern Trust Co*..... 497
2. The legislature has power to provide for publicity of the condition and business methods of such corporations. *State v. Northwestern Trust Co*..... 497

Corporations—*Concluded.*

3. The president of a corporation is the proper party to sign a petition for repaving in behalf of the corporation. *Eddy v. City of Omaha*..... 561

Costs.

When public officers are compelled to perform a statutory duty by mandamus, costs will be adjudged against them when the relator is without fault. *State v. Carlson*..... 837

Counties and County Officers. See DRAINS, 1. MANDAMUS, 5.

1. Ch. 8, laws 1899, the "Refunding Bond Act," provides for an appeal from findings of the district court as to the validity of county bonds, and authorizes the supreme court to make findings which are binding upon all parties to the record. *Colburn v. McDonald*..... 431

2. In such a proceeding the supreme court will only render a decision as to validity of the bonds. *Colburn v. McDonald*.. 431

3. It will not determine the effect of a decision as to innocent purchasers not parties to the record. *Colburn v. McDonald*, 431

4. A proposition to vote bonds in aid of a railroad is not void because it authorizes the county to accept capital stock of the company. *Colburn v. McDonald*..... 431

5. Where bonds in aid of a railroad are to be issued at a future time, the assessed valuation of the county last made before such bonds are actually issued is the basis in limiting the amount of such issue. *Colburn v. McDonald*..... 431

6. A municipality cannot repudiate its bonds after the compromise of a suit in which their validity was in issue, unless such bonds are absolutely void. *Colburn v. McDonald*.. 431

7. Sec. 42, ch. 28, Comp. St., 1901, limits the sum which may be retained by a county treasurer to fees and commissions actually received. *Maurer v. Gage County*..... 441

8. County boards in settling with county officers act ministerially; and in allowing officers to retain a greater sum than limited by law, their action is void, and the county may recover the excess. *Maurer v. Gage County*..... 441

9. It is the duty of county treasurers to deposit county funds as provided by sec. 18, art. III, ch. 18, Comp. St. *State v. Cronin*.....636, 642

10. When a county has refused to participate with an adjoining county in repairing a bridge, it is no defense to an action for contribution that the plaintiff county in making the repairs proceeded irregularly in obligating itself to pay for them. *Cass County v. Sarpy County*..... 93

Courts. See APPEAL AND ERROR, 11-14.

1. The supreme court is bound by the construction of the extradition laws adopted by the supreme court of the United States. *Dennison v. Christian*..... 703
2. The supreme court has no original jurisdiction of an action to cancel municipal taxes on insurance companies. *Aachen & M. F. Ins. Co. v. City of Omaha*..... 112
   Provident S. L. A. Society v. City of Omaha..... 113
3. In an application for mandamus to compel the enforcement of the law against the sale of liquor on Sunday, the district court has concurrent jurisdiction with the supreme court. *State v. Moores*..... 5
4. The opinions of the commissioners of the supreme court, designated as "unofficial," have no value as precedent in the sense in which the doctrine of *stare decisis* is applied. *Flint v. Chaloupka*..... 34

Covenants.

1. In an action for damages for breach of a covenant for quiet enjoyment in a deed, the real consideration may be proved by parol. *Holmes v. Seaman*..... 300
2. In such an action growing out of an exchange of lands, the measure of damages is the value of the property to which the plaintiff was entitled. *Holmes v. Seaman*..... 300

Creditors' Suit. See JUDGMENT, 2.

The beginning of a creditor's suit gives a specific lien upon the property which it is sought to reach, and during its pendency the judgment does not become dormant as to such property. *Flint v. Chaloupka*..... 34

Criminal Law. See HOMICIDE. INDICTMENT AND INFORMATION. JURISDICTION.

Appeal.

1. To effect an appeal in a misdemeanor case tried in an inferior court, the defendant must enter into a recognizance, with sureties, as is provided by sec. 324 of the criminal code. *Zobel v. State*..... 427

Continuance.

2. Where accused's witnesses were present, *held* that his application for a continuance, after the prosecutrix had changed her evidence, was properly denied. *Blair v. State*.. 501

Evidence.

3. Objection to evidence of a conversation over the telephone on the ground of want of identification of the person addressed, *held* properly overruled. *Lillie v. State*..... 228
4. In the trial of one charged with murder by firearms, it is not error to permit evidence that the defendant was familiar with the use of firearms. *Lillie v. State*..... 228

Criminal Law—*Continued.*

5. It is discretionary with the trial court to permit evidence of experiments to illustrate transactions that have been testified to. *Lillie v. State*..... 228
6. The admission of evidence not necessarily injurious, and not objected to when offered nor in the petition in error, is at most error without prejudice. *Lillie v. State*..... 228
7. In a murder trial it is proper to prove the physical conditions existing in the vicinity of the murder. *Lillie v. State*, 228
8. In a murder trial it is competent to prove the subsequent conduct, appearance and statements of the accused. *Lillie v. State*..... 228
9. In criminal trials the weight to be given evidence of previous good character is for the jury. *Lillie v. State*..... 228
10. Proof of motive is always competent in murder trials. *Lillie v. State*..... 228
11. It is not indispensable in criminal trials that a motive for the crime be proved. *Lillie v. State*..... 228
12. In a prosecution for murder committed with firearms, evidence that the defendant had access to such a weapon is not indispensable. *Lillie v. State*..... 228
13. Evidence in a trial for rape *held* sufficient to resist a demurrer thereto. *Blair v. State*..... 501
14. *Held*, that the record discloses no reversible error in receiving and rejecting evidence. *Blair v. State*..... 501
15. Evidence is relevant which shows that the accused threatened or assaulted a witness, endeavored to prevail on him to abscond and to induce him to testify falsely, or concealed his whereabouts. *Blair v. State*..... 501
16. In a prosecution for statutory rape evidence may be received to prove adulterous disposition of the parties. *Blair v. State* 501
17. In a prosecution for rape, evidence is admissible to prove that the accused concealed the prosecuting witness. *Blair v. State*..... 501
18. In a prosecution for rape, testimony of subsequent acts of illicit intercourse, related in time to the offense charged, is admissible as corroborative evidence. *Woodruff v. State*... 815
19. In a prosecution for rape, evidence that the accused promised to marry prosecutrix if any trouble arose is admissible. *Woodruff v. State*..... 815
20. Evidence in such case that the prosecutrix became pregnant is admissible. *Woodruff v. State*..... 815
21. Any attempt to suppress evidence, and prevent a trial by

Criminal Law—*Continued.*

flight may be shown against defendant in a criminal case. *Woodruff v. State* 815

22. In a prosecution for rape, an attempt by accused to have an abortion committed upon the prosecutrix may be shown. *Woodruff v. State* 815

23. In a prosecution for rape, where the previous chastity of the prosecutrix is in issue, it is not error to show that the prosecutrix was not aware that the accused was a married man. *Woodruff v. State* 815

24. In a prosecution for rape, where the previous chastity of the prosecutrix is involved, evidence of the general reputation of the prosecutrix is not admissible to prove prior unchastity. *Woodruff v. State* 815

25. To prove the previous unchastity of a prosecutrix in a charge of rape, evidence of the general reputation for unchastity of an associate is not admissible. *Woodruff v. State* 815

26. The admission of evidence that a third party, with whom the prosecutrix was alleged to have had illicit intercourse, was out of the state, *held* not prejudicially erroneous. *Woodruff v. State* 815

27. Identification of person accused of uttering a forged check *held* sufficient. *Mays v. State* 723

28. Statement of third person that he was guilty of the crime *held* hearsay. *Mays v. State* 723

29. Written statement of third person, not sworn to, that he committed the crime, not in the form of a deposition, is not competent evidence. *Mays v. State* 723

30. Proof of alibi. *Mays v. State* 723

31. A record of a stock-yards company of the receipt of stock, copied from a book of original entries, is not competent evidence for the purpose of tracing cattle, alleged to have been stolen, to the possession of the accused. *Donner v. State* 263

32. Where evidence of abandonment is conflicting, the supreme court will not pass on its sufficiency. *Cuthbertson v. State* .. 727

33. Evidence *held* sufficient to sustain a conviction of obtaining deed by false pretenses. *Moline v. State* 361

Instructions.

34. Instructions in a trial for obtaining a deed by false pretenses approved. *Moline v. State* 361

35. In a criminal trial it is not error to instruct the jury that the defendant is under no obligations to testify, and that

Criminal Law—*Continued.*

failure to testify creates no presumption against him. *Lillie v. State*..... 228

36. An instruction disparaging the evidence of the accused is erroneous. *Donner v. State*..... 263

37. An instruction as to "reasonable doubt" criticised. *Lillie v. State*..... 228
Mays v. State..... 723

38. That a clause of an instruction is incomplete is not ground for a reversal, if the paragraph is clear. *Blair v. State*..... 501

39. In a prosecution for rape an instruction limiting evidence of subsequent acts of illicit intercourse to corroborative purposes, *held* proper. *Woodruff v. State*..... 815

40. In a prosecution for rape an instruction limiting evidence that accused endeavored to have an abortion committed upon the prosecutrix to corroborative purposes, *held* proper. *Woodruff v. State*..... 815

Jury.

41. In criminal trials the qualification of a juryman is one of fact for the court. *Lillie v. State*..... 228

New Trial.

42. Equity will not grant a new trial in a criminal case on the ground of newly discovered evidence. *Hubbard v. State*... 62

43. The district courts have no inherent or common law power to grant new trials in criminal cases, on the ground of newly discovered evidence, at a subsequent term. *Hubbard v. State*..... 62

44. The jurisdiction of the district courts to grant new trials in criminal cases is derived from the statute. *Hubbard v. State*..... 62

45. Secs. 490-492 of the criminal code are the exclusive source of power of the district courts to grant such new trials. *Hubbard v. State*..... 62

46. Sec. 318 of the code has no application to the granting of new trials in criminal cases. *Hubbard v. State*..... 62

47. In capital cases a new trial should not be allowed on account of newly discovered evidence unless beneficial to the the defendant. *Lillie v. State*..... 228

48. Where in a criminal case a prejudicial instruction is given without testimony to sustain it, a new trial will be granted. *Blair v. State*..... 368

Trial.

49. On the trial of one for abandonment of wife the prosecution should not be permitted to prove improper conduct of the

Criminal Law—*Concluded.*

accused with other women before the desertion took place. *Cuthbertson v. State*..... 727

50. It is within the sound discretion of the trial court to permit a party to reopen his case and introduce further evidence. *Blair v. State*..... 501

51. An objection to the appearance of private counsel to assist the county attorney should be made at a suitable time and be supported by some showing that the county attorney did not request or require assistance. *Blair v. State*..... 501

52. An objection to the appearance of private counsel made in connection with the examination of a witness, and without showing, *held* properly overruled. *Blair v. State*..... 501

53. When men might differ as to a reasonable doubt of defendant's guilt, it is a question for the jury. *Lillie v. State*.... 228

Venue.

54. Prosecution for abandonment must be in the county where the parties resided at the time of separation, and where the wife resides when the neglect to maintain occurs. *Cuthbertson v. State*..... 727

Verdict.

55. In a trial for robbery a verdict will not be set aside for want of evidence, unless clearly wrong. *Henry v. State*.... 252

Witnesses.

56. It is not error for the court to request counsel to desist from further cross-examination of a witness along improper lines. *Woodruff v. State*..... 815

57. A trial court has a large discretion in granting or refusing permission to ask a witness leading questions. *Woodruff v. State*..... 815

58. The trial court may permit leading questions, on direct examination, to a reluctant witness. *Blair v. State*..... 501

59. In a criminal action, when accused is a witness, he is subject to the rules governing the usual cross-examination. *Ferguson v. State*..... 350

60. The credibility of accused as a witness is to be tested by the principles applicable to all witnesses. *Ferguson v. State*, 350

Damages. See COVENANTS, 2. INSTRUCTIONS, 1, 2.

1. Rule of damages for breach of contract stated. *Brown v. Cowles*..... 896

2. In an action against a city for personal injuries, $10,000 damages *held* excessive, and remittitur ordered. *City of South Omaha v. Sutliffe*..... 746

3. In an action on a saloon keeper's bond for damages caused by intoxication, a verdict of $2,000 *held* not excessive. *Felsch v. Babb*..... 736

Deeds. See COVENANTS. CRIMINAL LAW, 33.

Depositions.

By cross-examining a witness testifying by deposition, one does not waive objections to his competency. If the evidence in chief is excluded, the cross-examination should also be. *Bentley v. Estate of Bentley*..... 803

Descent and Distribution.

1. To constitute an advancement under sec. 37, ch. 23, Comp. St., 1903, it is necessary that the ancestor express that it be an advancement, or that he charge it in writing, or that the child acknowledge it in writing as an advancement. *Lodge v. Fitch*..... 652
2. A debt from an heir to an ancestor may be converted by the ancestor into an advancement, but when such debt is evidenced by note or bond this fact raises a strong presumption that the transaction was intended as a loan and not an advancement. *Lodge v. Fitch*..... 652
3. Evidence *held* insufficient to show a note executed by a daughter to her father was intended as an advancement. *Lodge v. Fitch*..... 652

Divorce.

In a divorce suit against a nonresident who appears in the cause, the court has jurisdiction to grant a divorce to defendant upon his cross-petition. *Pine v. Pine*..... 463

Drains.

1. A county board, in fixing assessments to pay for the construction of a drainage ditch, under art. I, ch. 89, Comp. St., 1899, acts judicially. *Dodge County v. Acom*..... 71
2. From such judgment error lies to the district court, and its findings have the same weight as the verdict of a jury. *Dodge County v. Acom*..... 71
3. The drainage of swamp lands is of general public utility, for which the legislature may create local administrative organizations. *Neal v. Vansickle*..... 105
4. Assessments for local improvements are void if in excess of the benefits conferred, or if levied without notice. *Neal v. Vansickle*..... 105
5. Where a ditch constructed jointly by two counties has proved insufficient, the county board of one of the counties has power to adopt a new system, of which the old ditch shall form a part, and assess the cost of construction upon the lands benefited. *Morris v. Washington County*..... 174

Ejectment.

1. In ejectment, title by adverse possession may be proved under a general denial, and when such title is relied upon

Ejectment—*Concluded.*

the defendant may have the jury instructed with reference to the same if any competent evidence has been introduced to support that issue. *Link v. Campbell*..... 310

2. In ejectment, where the defendant's answer is a general denial, it is not error to instruct the jury that the plaintiff must recover upon the strength of his own title. *Link v. Campbell*..... 310

3. In an action to try title to land against one in possession plaintiff must recover upon the strength of his own title. *Williams v. Daughetee*..... 270

Election of Remedies.

If, in making an election, one proceeds in ignorance of substantial facts, he may, when informed, adopt a different remedy. *Lamb v. Rooney*..... 322

Elections. See INJUNCTION, 2.

Eminent Domain.

1. Under the provisions of sec. 21, art. I of the constitution, the owner of property taken for a highway is entitled to the fair market value of the land taken, and also such additional damages as accrue to the remainder of the tract. *Scace v. Wayne County*..... 162

2. Where land is divided by a highway, the depreciation in value, if any, of the entire tract, after deducting special benefits, is a proper element of damage. *Scace v. Wayne County*..... 162

3. The rights of the owner of land over which a section line extends are the same, with reference to the assessment of damages for the location of a highway thereon, as those of the owners of other real estate. *Scace v. Wayne County*... 162

Equity. See CRIMINAL LAW, 42. ESTOPPEL, 1. MUNICIPAL CORPORATIONS, 13. NEW TRIAL, 5-10.

1. Where an adequate remedy exists at law, equity will not assume jurisdiction. *Brown v. Reed*..... 167

2. Equity will enforce a trust with respect to property stolen from the beneficial owner. *Lamb v. Rooney*..... 322

3. One who loses a right by failure to inquire when it is his duty to inquire is not entitled to relief in equity on the ground of mistake. *Farrell v. Bouck*..... 875

Estoppel. See INTOXICATING LIQUORS, 5.

1. In a foreclosure sale where a tax lien is deducted from the appraised value of the debtor's interest, and the purchaser takes advantage of the deduction, he cannot deny its validity in a suit to enjoin collection of the taxes. *Eddy v. City of Omaha*..... 550

Estoppel—*Concluded.*

2. If the negligence of one induces an act whereby an innocent man is injured, the culpable party must sustain the loss. *Humphrey Hardware Co. v. Herrick*..... 878

3. A party is estopped to complain of a ruling made at his request. *Holmes v. Seaman*..... 300

Evidence. See BASTARDY, 3, 5. BILLS AND NOTES, 2, 3, 5. CARRIERS, 8. COVENANTS, 1. CRIMINAL LAW, 3-33. DESCENT AND DISTRIBUTION, 3. HABEAS CORPUS, 6. INJUNCTION, 4. MASTER AND SERVANT. NEW TRIAL, 10. PARTNERSHIP, 2. RAILROADS, 4, 9. STATUTE OF FRAUDS, 3-6. TELEGRAPHS AND TELEPHONES.

1. Mortuary tables are admissible to show expectancy of life, but are not binding on the jury. *City of South Omaha v. Sutliffe*..... 746

2. A preponderance of evidence is all that is required to maintain an issue in a civil action. *Link v. Campbell*..... 307

3. Expert testimony must be based upon supposed facts of the existence of which there is evidence before the court. *Goken v. Dallugge*..... 16

4. Opinions of medical experts as to the cause or effect of a physical injury are admissible. *City of South Omaha v. Sutliffe*..... 746

5. Parol evidence cannot be received for the purpose of modifying or explaining an unambiguous written agreement. *Agnew v. Montgomery*..... 9

6. In actions for personal injuries, every indirect injury need not be alleged to lay the foundation for such proof on the trial. *City of South Omaha v. Sutliffe*..... 746

7. Evidence in a personal injury case *held* not sufficient to bring the injury within the reason of the "humane doctrine" or "last chance." *McLean v. Omaha & C. B. R. & B. Co*..... 450

8. Evidence in an action for personal injuries *held* not sufficient to sustain the judgment. *Chicago, B. & Q. R. Co. v. Roberts*..... 539

9. Evidence in an action for personal injuries caused by a defective sidewalk, *held* sufficient to sustain the judgment. *City of Minden v. Vedene*..... 657

10. Evidence in an action for personal injuries *held* not sufficient to sustain the judgment. *Fremont Telephone Co. v. Keeler*..... 613

11. Evidence in an action on account *held* sufficient to sustain the judgment. *Horner v. Hughbanks*..... 467

Evidence—*Concluded.*

12. Evidence in a suit to cancel a mortgage *held* sufficient to sustain the judgment. *Faulkner v. Powell*..... 474

13. Evidence in an action on an insurance policy examined, and *held* that no waiver has been proved. *Western Travelers Accident Ass'n v. Tomson*..... 661

14. Evidence in an action of forcible detainer *held* sufficient to sustain the judgment. *Thull v. Allen*..... 760

15. Evidence in an action to enforce a pledge, *held* to support the judgment. *Western Fly Guard Co. v. Hodges*..... 313

16. Evidence in a proceeding to recover value of improvements made by occupying claimant, *held* insufficient to sustain the findings. *Gombert v. Lyon*..... 319

Exceptions, Bill of.

The trial court has no authority to extend the time for preparing and serving a bill of exceptions more than 80 days from the adjournment of the term. *Stock v. Luebben*..... 254

Executors and Administrators.

1. In proceedings for the sale of real estate to pay debts of a deceased person, judgments of the district court will not be disturbed unless mistakenly made, or there is an abuse of discretion. *In re Estate of Parker*..... 601

2. Upon final settlement of an executor's accounts he is entitled to credit for the sum paid to satisfy a mortgage, where the will and order of the county court authorized it. *Patrick v. Patrick*..... 454

3. An application by an executor to sell real estate is a special statutory proceeding. *Bixby v. Jewell*..... 755

Extradition. See HABEAS CORPUS.

1. Sec. 364 of the criminal code does not authorize extradition of a person charged with crime against the laws of another state without proof that he is a fugitive from justice. *Dennison v. Christian*..... 703

2. The warrant need not state that the governor has found that the accused is a fugitive from justice; the issuing of the warrant raises that presumption. *Dennison v. Christian*, 703

False Pretenses. See CRIMINAL LAW, 33, 34.

Forgery. See CRIMINAL LAW, 27-30.

Fraudulent Conveyances. See HOMESTEAD, 4.

Transactions between near relatives which tend to hinder creditors should be carefully scrutinized. *Penn v. Trompen*, 273

Habeas Corpus.

1. The judgment of a district court in a proceeding in habeas corpus will not be reviewed on appeal. *In re Greaser*..... 612

2. The writ of habeas corpus cannot operate as a proceeding in error. *Michaelson v. Beemer*..... 761

3. Where a prisoner is held under a void commitment, but is properly informed against, on habeas corpus he should be discharged on the illegal commitment, and remanded to the court having jurisdiction of the information. *Michaelson v. Beemer*..... 761

4. In habeas corpus to obtain the discharge of one held under warrant in extradition, the return need not contain affirmative allegations of all the facts upon which the extradition proceedings are based. *Dennison v. Christian*..... 703

5. In extradition, the governor must determine whether the person demanded is charged with a crime, and whether he is a fugitive from justice. *Dennison v. Christian*..... 703

6. In determining the sufficiency of evidence in habeas corpus, the supreme court will not regard errors in admitting incompetent evidence, if, upon the evidence conceded to be competent, a correct conclusion be reached. *Dennison v. Christian* 703

7. The relator in habeas corpus should not be cross-examined on matters not relating to his examination in chief. *Dennison v. Christian*..... 703

Highways.

1. A township is not liable for injuries caused by reason of defects in highways. *Wilson v. Ulysses Township*..... 807

2. One who accepts an allowance for damages caused by the location of a public road is concluded thereby. *Stocker v. Nemaha County*..... 255

Homestead.

1. Issues made upon allegations in intervener's petition to quiet title in a homestead *held* reviewable on appeal. *National Bank of Commerce v. Chamberlain*..... 469

2. Homestead rights connot be devested by the act of the husband alone, but subsist in the wife after she has been abandoned by her husband. *National Bank of Commerce v. Chamberlain*..... 469

3. Both an intention to abandon and an actual abandonment must concur to show an abandonment of the homestead. *National Bank of Commerce v. Chamberlain*..... 469

Homestead—*Concluded.*

4. A homestead is not a subject of fraudulent alienation. *National Bank of Commerce v. Chamberlain*..... 469
5. A homestead cannot be disposed of at administrator's sale. *Bixby v. Jewell*..... 755

Homicide. See CRIMINAL LAW, 4-12.

1. An instruction purporting to state the offense of murder which omits material elements of the offense charged in the indictment is erroneous. *Hans v. State*..... 288
2. In a trial for murder, an instruction which limits the right of self-defense to one in the lawful pursuit of his business is erroneous. *Hans v. State*..... 288

Husband and Wife. See CRIMINAL LAW, 32, 49, 54.

1. The common law disability of husband and wife to sue each other is removed by statute. *Trayer v. Setzer*..... 845
2. The common law rule that a husband, because of the marriage relation, is liable jointly with his wife for torts committed by her in his presence does not exist in this state. *Goken v. Dallugge*..... 16
3. In an action on account against a married woman, plaintiff must prove, in order to recover, that the transaction was had with reference to her separate property. *Bentley v. Estate of Bentley*..... 803

Indictment and Information.

1. In charging the commission of an offense in an information, it is not necessary that the exact words of the statute be used. *Smith v. State*..... 345
2. If words in an information mean the same as those found in the statute denouncing the offense, the information will be upheld. *Smith v. State*..... 345
3. Allegations of an information *held* sufficient to charge an assault with intent to commit a robbery, and to support a judgment of conviction. *Smith v. State*..... 345
4. The language of ch. 104, laws 1899, includes instruments conveying the title to real estate. *Moline v. State*..... 361
5. An information for wife desertion under sec. 212*a* of the criminal code must set out both an abandonment and neglect to maintain without good cause. *Cuthbertson v. State*.. 727
6. Information under sec. 125 of the criminal code *held* not duplex. *Moline v. State*..... 361
7. Where an information contains two or more counts charging separate offenses of the same nature, the trial court may require an election at any time before the defense is interposed. *Blair v. State*..... 501

Indictment and Information—*Concluded.*

8. Where an information contained three counts, each charging statutory rape, but on different dates, the first count being insufficient in law, *held* that a motion to quash the second and third was properly overruled. *Blair v. State*... 501

Infants. See RAILROADS, 1

Injunction. See EQUITY, 1. MUNICIPAL CORPORATIONS, 8. TAXATION, 16. TRIAL.

1. An injunction by a court without jurisdiction is void. *State v. Carlson*..... 837
2. The duty of an election board to canvass votes is a statutory duty which cannot be enjoined. *State v. Carlson*..... 837
3. A taxpayer of a city cannot enjoin a franchise to a telephone company, unless the grant constitutes such a squandering of money or property of the city that taxation will be increased thereby. *Clark v. Interstate Independent Telephone Co*..... 883
4. Evidence in a suit to enjoin a trespass *held* to sustain judgment of dismissal. *Kelley v. Boyer*..... 41

Instructions. See CRIMINAL LAW, 34-40. HOMICIDE. REPLEVIN, 2. STREET RAILWAYS, 1.

1. In an action for personal injuries, *held* not error to omit from the instructions reference to the social standing of plaintiff's mother. *City of South Omaha v. Sutliffe*..... 746
2. Instructions *held* to not permit a recovery for loss of earnings during plaintiff's minority. *City of South Omaha v. Sutliffe* 746
3. The use in an instruction of the phrase "a fair preponderance of the evidence" criticised, but *held* not to be prejudicially erroneous. *Link v. Campbell*..... 310
4. An instruction which submits an issue supported by insufficient evidence is erroneous. *Link v. Campbell*..... 307
5. Instructions that require plaintiff to prove substantive facts not necessary to a recovery are erroneous. *Parkins v. Missouri P. R. Co*..... 831
6. Pleadings and evidence in an action to recover the value of horses examined, and *held* that instruction complained of was not erroneous. *Smith v. Corrigan*..... 686

Insurance. See TAXATION.

1. One who will suffer loss by the destruction of property has an insurable interest in it. *Farmers & Merchants Ins. Co. v. Mickel*..... 122
2. When an insurance company issues its policy and accepts the premium, without an application and without inquiry

Insurance—*Concluded.*

as to title to the property, and the insured has an insurable interest therein, the company is liable. *Farmers & Merchants Ins. Co. v. Mickel* 122

Beneficial Associations.

3. In an action upon a municipal benefit certificate, where the defense is suicide, the burden is upon the defendant to establish such fact. *Hardinger v. Modern Brotherhood of America* 860, 869

4. The question of the proximate cause of death of insured is ordinarily for the jury. *Hardinger v. Modern Brotherhood of America* 860

5. When circumstantial evidence is relied on to establish suicide, the defense fails unless the circumstances fairly exclude every other hypothesis of death. *Hardinger v. Modern Brotherhood of America* 860

6. The presumption that a sane person will not destroy his own life is a rebuttable one. *Hardinger v. Modern Brotherhood of America* 869

7. Proof of facts which exclude all reasonable probability of death by murder or accident establishes *prima facie* the defense of suicide. *Hardinger v. Modern Brotherhood of America* 869

8. In an action on an insurance policy, where the defense of suicide is clearly established, it is the duty of the trial court to direct a verdict for defendant. *Hardinger v. Modern Brotherhood of America* 869

9. If an insurance company has actual knowledge of a loss, formal notice is dispensed with. *Western Travelers Accident Ass'n v. Tomson* 674

10. In an action on an accident insurance policy, a denial of liability for the reason that no accident occurred, made after the time for giving notice of the accident, *held* not a waiver of a provision that no claim shall be valid unless written notice of the accident be given within 15 days. *Western Travelers Accident Ass'n v. Tomson* 661

Intoxicating Liquors.

1. A final order by a district court in a liquor license case cannot be reviewed upon appeal. *Halverstadt v. Berger*... 462

2. Under sec. 1, ch. 50, Comp. St., 1903. a licensing board, on an application to grant a liquor license, must pass upon the character and standing of the applicant, and the board cannot delegate these functions. *In re Krug* 576

3. The board of fire and police commissioners of a city of the

Intoxicating Liquors—*Concluded.*

metropolitan class is without authority to grant a liquor license to one who has no interest in the license. *In re Krug*, 576

4. An applicant for a liquor license must be a person able, willing and competent to carry out the trust. *In re Krug*.. 576

5. The holder of a liquor license is not estopped to deny having purchased liquors sold to persons doing business under it in his name. *Moise & Co. v. Krug*..... 43

Irrigation. See WATERS.

Judgment. See WATERS, 2.

1. A decree directing a party to pay a specific fund into court for distribution, *held* not to be a lien upon the real estate of such party unless the decree so provides. *Campbell v. Noyes, Norman & Co*..... 201
Campbell v. Tracy..... 548

2. In a creditor's suit the decree canceled a mortgage and ordered a bank to pay a fund into court. *Held*, That the decree did not constitute a lien on the real estate of the bank. *Campbell v. Noyes, Norman & Co*..... 201
Campbell v. Tracy..... 548

3. A right, question or fact in issue and determined by a court cannot be relitigated between the same parties, though the second suit is for a different cause of action. *Chicago, B. & Q. R. Co. v. Cass County*..... 489

4. A claim for taxes under the assessment for one year is not the same cause of action as a claim for taxes on the same property under an assessment for a prior year. *Chicago, B. & Q. R. Co. v. Cass County*..... 489

5. If the liability of property to taxation depends on a fact determined in one action, it cannot be controverted by the same parties in a subsequent litigation. *Chicago, B. & Q. R. Co. v. Cass County*..... 489

6. Whether a railroad bridge over the Missouri river is "a part of the continuous line of road" within the meaning of secs. 39 and 40, ch. 77, Comp. St., 1901, is a question of law, and an adjudication of the question will not operate as an estoppel. *Chicago, B. & Q. R. Co. v. Cass County*..... 489

7. The overruling of a motion for leave to file a petition of intervention is not *res judicata* of the matters contained in the petition. *Hamilton Nat. Bank v. American L. & T. Co*.. 81

8. The same rule applies to the summary overruling of objections to the discharge of a receiver. *Hamilton Nat. Bank v. American L. & T. Co*..... 81

9. A judgment in a suit will not be a bar to a subsequent

Judgment—*Concluded.*

suit unless the same issue is presented and the parties are the same. *Hamilton Nat. Bank v. American L. & T. Co*.... 81

10. The holding of the federal court that a corporation was not a banking institution, *held* not *res judicata* of the constitutional liability of the stockholders. *Hamilton Nat. Bank v. American L. & T. Co*..... 81

11. A judgment against a plaintiff in an action for damages for locating a road is *res judicata* of the facts alleged in a subsequent suit in equity based on the same facts. *Stocker v. Nemaha County*..... 255

12. One is not concluded by a judgment or decree in a suit to which he was not a party at the time when it was rendered. *Agnew v. Montgomery*..... 9

13. To constitute an estoppel, the issues in the prior suit must include the matters at issue in the suit where the estoppel is pleaded. *Agnew v. Montgomery*..... 9

14. Judgment conforming to "the law of the case" as established on a former hearing sustained. *Farrell v. Bouck*.... 875

15. A judgment is not a lien upon an equitable interest in real estate. *Flint v. Chaloupka*..... 34

16. The provisions of secs. 10 and 16 of the code, known as the statute of limitations, do not apply to actions upon domestic judgments. *Snell v. Rue*..... 571

17. An order of the district court that a claim against an estate is equitable and not triable as a law action, *held* interlocutory. *Huffman v. Rhodes*..... 57

18. An interlocutory order may be vacated at a subsequent term, without compliance with the provisions of section 602 *et sequitur* of the code. *Huffman v. Rhodes*..... 57

Jurisdiction. See COURTS, 2, 3. DIVORCE.

The judge of a district court has no jurisdiction to try one charged with a felony without a jury. *Michaelson v. Beemer* 761

Jury. See CRIMINAL LAW, 41.

1. A court has a large discretion in sustaining challenges for cause of jurors. *Felsch v. Babb*..... 736

2. That a bailiff who summoned a talesman as a juror testified as a witness for the successful party is not assignable for error. *Felsch v. Babb*..... 736

Justice of the Peace.

1. A justice of the peace has no jurisdiction of an action for damages for a breach of a covenant for quiet enjoyment, where such breach consists of an eviction by one having a paramount title. *Holmes v. Seaman*..... 304

Justice of the Peace—*Concluded.*

2. A justice of the peace has jurisdiction of an action for damages for breach of covenant in a deed, when the damages do not exceed his jurisdiction and the title to land is not involved. *Holmes v. Seaman*..... 300

3. An offer to confess judgment in a suit before a justice of the peace need not be included in the transcript. *State v. Ellsworth*..... 277

Larceny. See CRIMINAL LAW, 31.

Limitation of Actions. See JUDGMENT, 16. WATERS, 4.

Lis Pendens.

1. One who, with notice, purchases real estate from a defendant in an action to recover dower, while the case is pending on appeal, takes title subject to the claim of dower. *Martin v. Abbott*..... 89

2. In such a case, where no supersedeas bond is provided for or filed, the rule is the same. *Martin v. Abbott*..... 89

Mandamus. See CARRIERS, 6-8. COSTS. MUNICIPAL CORPORATIONS, 12.

1. It is in the discretion of the supreme court to issue or refuse a writ of mandamus. *State v. Moores*..... 5

2. A peremptory writ of mandamus will not be issued, except with a view to enforce its mandates. *State v. Moores*..... 5

3. It is no defense to an application for a mandamus that action has been enjoined, if the court which issued the injunction was without jurisdiction. *State v. Carlson*..... 837

4. Mandamus will lie to compel a county treasurer to comply with the provisions of sec. 18, art. III, ch. 18, Comp. St., relating to deposits of county funds. *State v. Cronin*..636, 642

5. Where a bridge over a stream divides two counties, it is the duty of either county, when notified by the other to join in repairs of the bridge, to either comply with the notice or refuse to do so, which duty may be enforced by mandamus. *Iske v. State*..... 278

6. Where an *ex parte* order extending the time for presenting a bill of exceptions is fraudulently obtained, a district judge will not be compelled by mandamus to allow the bill. *State v. Sornborger*..... 615

Married Women. See HUSBAND AND WIFE.

Master and Servant.

1. Evidence in an action for personal injuries caused by defective appliances, *held* to support the verdict. *Fremont Brewing Co. v. Schulz*..... 631

Master and Servant—*Concluded.*

2. It is only when the evidence is insufficient that the court is justified in instructing that negligence did not exist. *Fremont Brewing Co. v. Schulz*..... 631

Mortgages. See ATTACHMENT.

1. Where a cross-petition to foreclose a mortgage alleges that one of the defendants assumed the mortgage debt and no answer is filed, a finding that the allegations of the cross-petition are true concludes said defendant. *Smith v. Allen*.. 170
2. A general prayer for equitable relief in a foreclosure petition, followed by motion and notice for a deficiency judgment, confer jurisdiction. *Smith v. Allen*..... 170
3. Where a foreclosure suit was dismissed on motion, on the ground of a prior adjudication between third parties, *held* error. *Gillman v. Topinka*..... 96

Municipal Corporations. See BONDS, 3. EVIDENCE, 9. NEGLIGENCE. TAXATION, 20, 22, 23.

1. Where the surface of a paved street is decayed and it is proposed to replace it on the same concrete base, it constitutes a "repaving" and not a "repairing" under the metropolitan charter. *McCaffrey v. City of Omaha*..... 583
2. Repaving of streets can be done only upon a petition of the abutting property owners. *McCaffrey v. City of Omaha*, 583
3. Under a city charter requiring 30 days' notice to property owners to designate the material to be used in repaving, the notice is jurisdictional. *Eddy v. City of Omaha*..... 550
4. Under the metropolitan city charter property owners have 30 days in which to designate by petition the material to be used in repaving. If such petition is filed, the mayor and council will not lose jurisdiction by acting on such petition before the 30 days have expired, if no other petition is filed. *Eddy v. City of Omaha*..... 561
5. Where a city charter requires notice to designate material for paving and the city relies upon a waiver of the failure to give notice, it must plead it. *Eddy v. City of Omaha*.... 550
6. Where a statute requires six days' notice of the meeting of a city council as a board of equalization, notice must be given during the six days immediately prior to the date of the meeting. *Shannon v. City of Omaha*..... 281
7. That the city attorney is the owner of lots which the city seeks to charge with a special assessment does not charge him with notice of the action of officers of the city with reference to such lots. *Shannon v. City of Omaha*..... 281
8. After an improvement is made and the cost of paving intersections is paid for, special assessments cannot be en-

Municipal Corporations—*Concluded.*
joined because a fund for the intersections was not available at the time the improvement was ordered. *Eddy v. City of Omaha*..... 561
9. A partial estimate by the city engineer of Omaha on a paving contract, made to the board of public works and the city council, is a claim against the city under sec. 33 of the charter. *Lobeck v. State*..... 595
10. A taxpayer may appeal from the order of the city council approving and allowing such a claim to the district court. *Lobeck v. State*..... 595
11. The appeal suspends the order of the council, and during its pendency the comptroller is not required to deliver the warrant for the payment of the estimate to the claimant. *Lobeck v. State*..... 595
12. During the pendency of such appeal, mandamus will not lie to compel the delivery of the warrant. *Lobeck v. State*.. 595
13. Where a purchaser of lands subject to an apparent lien for special assessments procures title by a conveyance which recites that they are subject to the lien, which the purchaser assumes, he cannot sue in equity to set aside the tax as invalid. *Eddy v. City of Omaha*..... 550
14. Under subdiv. 63, sec. 68, ch. 15, laws of 1889, which allows special taxes to be paid before delinquency under protest, a person must pay the taxes before the whole amount is delinquent, before he is entitled to recover. *City of South Omaha v. McGavock*..... 382
15. A judgment in a proceeding under sec. 101, art. I, ch. 14, Comp. St., 1903, to detach territory from a municipality, will not be reversed in the absence of a showing of mistake of fact or law. *Michaelson v. Village of Tilden*..... 744
16. In an action for personal injuries, evidence as to the distance of the surface of a sidewalk from the ground and the slope of the ground, *held* to be within the issues. *City of Omaha v. Houlihan*..... 326

Negligence. See ESTOPPEL, 2. RAILROADS. TRIAL, 1.
1. Whether a liability arising from a breach of an ordinance accrues for the benefit of an individual or the public depends on the nature of the duty enjoined. *Frontier Steam Laundry Co. v. Connolly*..... 767
2. An ordinance which requires fireproof shutters on brick buildings within cities is for the benefit of the public. *Frontier Steam Laundry Co. v. Connolly*..... 767
3. Where property held by a bailee is destroyed by fire which spread from another building through windows unprotected

Negligence—*Concluded.*

by fireproof shutters, in violation of an ordinance, he is not liable. *Frontier Steam Laundry Co. v. Connolly*..... 767

4. Where the proximate cause of an injury depends upon facts from which different inferences may be drawn, it is a question for the jury. *Lincoln Traction Co. v. Heller*..... 127

5. The violation of statutory or municipal regulations will sustain a private action for negligence, if the other elements of actionable negligence concur. *Lincoln Traction Co. v. Heller*..... 127

6. Negligence, contributory negligence and the proximate cause of an injury are questions for the jury, when the evidence is conflicting. *City of Omaha v. Houlihan*..... 326

New Trial. See CRIMINAL LAW, 42-48.

1. The matter of granting new trials is one of sound legal discretion. *Kleutsch v. Security Mutual Life Ins. Co*..... 75

2. Where a second trial results as the first, error cannot be predicated on an order granting a new trial. *Kleutsch v. Security Mutual Life Ins. Co*..... 75

3. A new trial for newly discovered evidence will not be granted where it is hearsay and incompetent. *McNeal v. Hunter* 579

4. One seeking a new trial for newly discovered evidence must show diligence. *McNeal v. Hunter*..... 579

5. In a suit in equity to obtain a new trial of an action at law, it must appear that there was a genuine controversy, a determination adverse to the party complaining, that he was by fraud or accident deprived of his right to be heard, and that he was without fault. *Zweibel v. Caldwell*..... 53

6. It must appear that an issue was presented by the pleadings and evidence. *Zweibel v. Caldwell*..... 53

6*a*. If the facts set out show the rulings complained of, it is not necessary to allege error in the trial at law. *Zweibel v. Caldwell*..... 53

7. If the petition is defective and evidence is given showing the ruling complained of, the party offering such evidence cannot object to such defect. *Zweibel v. Caldwell*..... 53

8. Where a party has, without fault, failed to obtain a transcript for a review on error in this court, a new trial will be granted. *Zweibel v. Caldwell*..... 47

9. It is not necessary to such right that error in the judgment sought to be reviewed should be alleged or proved. *Zweibel v. Caldwell*..... 47

New Trial—*Concluded.*

10. Evidence *held* to sustain a trial court's finding that the failure to obtain a transcript was without fault on appellant's part. *Zweibel v. Caldwell*..... 47

Notice. See ATTACHMENT, 1. INSURANCE, 9. MUNICIPAL CORPORATIONS, 3-7. TAXATION, 8, 28, 31.

Under sec. 403 of the code proof of publication of notice of sitting of board of equalization must be made within six months. *Lonergan v. City of South Omaha*..... 317

Nuisance.

Where a city of the metropolitan class seeks to abate a nuisance consisting of stagnant water upon vacant lots, the statute requiring notice to the owner, no jurisdiction is acquired until such notice is given. *Shannon v. City of Omaha* 281

Officers. See BONDS, 2.

Partnership.

1. Contribution for payment of partnership debts cannot be enforced until final settlement of the partnership affairs. *Foss v. Dawes*..... 608
2. Evidence *held* insufficient to show a final settlement of partnership affairs. *Foss v. Dawes*..... 608
3. An agreement between two persons to engage in a business venture, which provides that one of them is to receive one-third of the net profits as compensation for his services, does not create a partnership. *Agnew v. Montgomery*..... 9

Pleading and Practice. See CARRIERS, 1, 2, 5. EVIDENCE, 6. INSURANCE, 10.

1. A defendant may set forth in his answer several grounds of defense provided they are not repugnant. *Western Travelers Accident Ass'n v. Tomson*..... 661
2. Where an answer pleads a failure to give notice, and a reply pleads a waiver and avoidance, the allegation that no notice was given is admitted. *Western Travelers Accident Ass'n v. Tomson*..... 661
3. Where the pleadings admit that no notice was given and rely upon a waiver or estoppel, the only question is whether there was a waiver. *Western Travelers Accident Ass'n v. Tomson* 661
4. A defense based upon the conditions of a policy of insurance is inconsistent with a defense which asserts that no policy was in force at the time of the loss. *Western Travelers Accident Ass'n v. Tomson*..... 661
5. A plaintiff may, subject to attack by motion or demurrer,

Pleading and Practice—*Concluded.*

plead matter in avoidance of an anticipated defense, and may supplement the same in his reply by allegations not inconsistent therewith. *Western Travelers Accident Ass'n v. Tomson*..... 674

6. Pleadings after verdict and judgment will be liberally construed. *Western Travelers Accident Ass'n v. Tomson*..... 674

7. If an insurance company denies loss, it does not thereby waive proof of notice of the same. *Western Travelers Accident Ass'n v. Tomson*..... 680

8. When a defendant in replevin alleges title, he waives the defense of want of possession at the beginning of the action. *McGinley v. Wirthele*..... 602

9. In an action based on a breach of a contract of sale, a defendant cannot rely as a defense upon conditions in a written contract not pleaded. *Westinghouse Co. v. Meixel*.. 623

10. Defense of new matter must be pleaded. *Westinghouse Co. v. Meixel*..... 623

11. A general allegation of negligence is good against a demurrer. *Chicago, R. I. & P. R. Co. v. O'Donnell*..... 900

12. An amended petition which restates the *gravamen* of the complaint is not a departure, although the petition sounded in tort and the amendment avers a contract liability only. *Shoemaker v. Commercial Union Assurance Co*..... 650

13. Amended petition in action for personal injuries, *held* not to state a new cause of action. *Chicago, R. I. & P. R. Co. v. O'Donnell*..... 900

14. Amended petition in foreclosure, *held* to state a cause of action. *Colby v. Foxworthy*..... 378

15. The practice of amending pleadings by interlineation or erasure is not favored. *Western Travelers Accident Ass'n v. Tomson*..... 661

Pledges.

A pledge of negotiable paper to secure the payment of the purchase price of chattels vests in the vendor a lien upon it, which he may enforce in equity. *Western Fly Guard Co. v. Hodges*..... 313

Principal and Surety.

1. A defendant found to be a surety paid the judgment. *Held*, That he was entitled to collect the same by execution against his principal. *Nelson v. Webster*..... 332

2. In an action against a principal and surety, a finding under sec. 511 of the code that the parties are principal and surety need not be relitigated in an action to subrogate the surety

Principal and Surety—*Concluded.*

to the rights of the creditor against the principal. *Nelson v. Webster*..... 332

3. Sureties upon an official bond are liable for a statutory penalty incurred by their principal by taking illegal fees. *Eccles v. United States F. & G. Co*..... 734

Promissory Notes. See BILLS AND NOTES.

Quieting Title.

1. Where an occupying claimant makes lasting improvements, the measure of his recovery is the value of such improvements. *Gombert v. Lyon*..... 319
2. In an action *quia timet* pleadings and evidence *held* to support the judgment. *O'Neal v. Bellevue Improvement Co*... 899

Quo Warranto.

The remedy to set aside a franchise fraudulently granted is by *quo warranto* at the suit of the state. *Clark v. Interstate Independent Telephone Co*..... 883

Railroads.

1. No arbitrary rule exists to fix the age at which a child is capable of understanding dangers to be encountered upon railroad tracks. Ordinarily, such question is one of fact for the jury. *Chicago, B. & Q. R. Co. v. Russell*..... 114
2. In an action against a railroad company for injuries it is proper to show a custom of the company. *Chicago, B. & Q. R. Co. v. Russell*..... 114
3. Whether a railroad company was negligent in backing its train without special warning is a question for the jury. *Chicago, B. & Q. R. Co. v. Russell*..... 114
4. Evidence in an action for injury at a crossing, *held* to sustain the verdict. *Chicago, B. & Q. R. Co. v. Russell*..... 114
5. Where a railroad company has established a station outside the limits of a city or village, it is not bound, under sec. 1, art. I, ch. 72, Comp. St., 1903, to fence its road at that point. *Chicago, B. & Q. R. Co. v. Sevcek*..... 793
6. Failure to fence at stations is excusable only to an extent sufficient to afford the public and the railroad company necessary facilities. *Chicago, B. & Q. R. Co. v. Sevcek*..... 793
7. It is the locality where animals pass onto the right of way that determines the liability of a railroad company for failure to fence. *Chicago, B. & Q. R. Co. v. Sevcek*..... 793
8. The intent of sec. 1, art. I, ch. 72, Comp. St., 1903, is to require railroad companies to fence their tracks except at stations and in cities and villages. *Chicago, B. & Q. R. Co. v. Sevcek*..... 799

Railroads—*Concluded.*

9. Evidence in action to recover damages resulting from fire set by sparks from a locomotive, *held* not sufficient to support the verdict. *Union P. R. Co. v. Fickenscher*..... 187

Rape. See CRIMINAL LAW, 13-26, 39, 40.

Replevin.

1. Action of the trial court in making up issues in replevin, *held* not prejudicial. *Penn v. Trompen*..... 273

2. Instructions in replevin action approved. *Penn v. Trompen* 273

Res Judicata. See JUDGMENT, 3, 5-13.

Review. See APPEAL AND ERROR.

Roads. See HIGHWAYS.

Sales.

1. That a contract for the sale of hay provides that it is to be paid for before taken from the farm does not prevent the title passing; it merely gives a lien for the purchase money, which may be waived. *Allen v. Rushfort*..... 907

2. Under the pleadings and evidence, *held*, that the seller waived her lien; that an action for the contract price was properly brought, and that the case should have been submitted to the jury. *Allen v. Rushfort*..... 907

3. Under the facts, *held*, that there was a waiver of the provisions of a written contract, that retention of machinery after a four-days' trial constituted an acceptance. *Westinghouse Co. v. Meixel*..... 623

Schools and School Districts.

A board of education may authorize its president to sign a petition for paving. *Eddy v. City of Omaha*..... 561

Sheriffs and Constables.

One cannot recover damages from a sheriff for negligence in the levy of a writ if he has contributed to the result by his own negligence. *Parrott v. McDonald*..... 97

Specific Performance.

1. A provision in a decree of specific performance that plaintiff shall secure deferred payments is not prejudicial to defendant. *Ruzicka v. Hotovy*..... 589

2. Provisions in a decree for specific performance as to interest on deferred payments, *held* sufficient. *Ruzicka v. Hotovy* 589

States.

A creditor of the state is not excused from presenting his claim to the auditor of public accounts for settlement and allowance within two years after its accrual by the fact that the legislature has not made an appropriation for its payment. *Lincoln S. D. & T. Co. v. Weston*..... 536

Statute of Frauds.

1. It is not necessary that a memorandum sufficient to evidence a sale of real estate, should be contained in a single letter. *Collyer v. Davis*..... 887
2. An undelivered deed submitted to the grantee may be considered in aid of an imperfect description in another written memorandum. *Collyer v. Davis*..... 887
3. Evidence *held* to show a sufficient memorandum of contract of sale of land. *Collyer v. Davis*..... 887
4. A memorandum of a contract of sale of land is not void for uncertainty in the description, if it can be made certain by parol evidence. *Ruzicka v. Hotovy*..... 589
5. In such memorandum, if the time for executing the deed, paying the consideration and giving securities are not stated these matters may be shown by parol evidence. *Ruzicka v. Hotovy*..... 589
6. A written offer to lease, signed by the lessee and accepted by the lessor, is competent evidence of a valid contract. *Butterfield v. Commercial Cattle Co*..... 605

Statutes.

1. An enrolled bill found in the office of the secretary of state, signed by the officers of the legislature and approved by the governor, is *prima facie* evidence of its enactment. *Colburn v. McDonald*..... 431
2. Legislative journals may be looked into for the purpose of ascertaining whether a law was properly enacted. *Colburn v. McDonald*..... 431
3. The silence of the legislative journals is not conclusive evidence of the nonexistence of a fact which ought to be recorded therein regarding the enactment of a law. *Colburn v. McDonald*..... 431
4. In order to overthrow such enrolled bill, it must be made to affirmatively appear by the legislative journals that it did not pass. *Colburn v. McDonald*..... 431

Street Railways.

1. In an action against a street railway company, an instruction that the burden is upon the company to prove that it was not guilty of negligence, *held* erroneous. *Lincoln Traction Co. v. Heller*..... 134

Street Railways—*Concluded.*

2. Street railway companies are common carriers. They are required to exercise the utmost care, and are liable for the slightest negligence. *Lincoln Traction Co. v. Heller*..... 127

3. The law presumes that one injured while being transported by a common carrier was injured in consequence of the latter's negligence. *Lincoln Traction Co. v. Heller*..... 127

Taxation. See CONSTITUTIONAL LAW, 7, 11. COURTS, 2. DRAINS. ESTOPPEL, 1. JUDGMENT, 3-6. MUNICIPAL CORPORATIONS, 14. NOTICE.

1. The state board, in the equalization of property between counties under sec. 130, art. I, ch. 77, Comp. St., 1903, may act upon the abstracts of assessments and the knowledge of its own membership as to values. *Hacker v. Howe*..... 385

2. The trial court found that the state board acted in good faith and without fraud in equalizing assessments. *Held*, That these questions are eliminated on appeal. *Hacker v. Howe* 385

3. The values found by county assessor are not conclusive. The assessments as finally made are the values found by the assessors, as corrected and equalized by the county and state boards of equalization. *Hacker v. Howe*..... 385

4. An assessment is not final until acted upon by the county and state boards of equalization, and certified to the county clerks and extended upon the tax rolls. *Hacker v. Howe*.. 385

5. An assessment is an official listing of persons and property, with an estimate of the value of the property of each for purposes of taxation. *Hacker v. Howe*..... 385

6. The state board, in the equalization of assessments between counties, acts *quasi* judicially, and its action is not subject to collateral attack except for fraud or the exercise of power not conferred upon it by law. *Hacker v. Howe*..... 385

7. The action of the state board, in the equalization of assessments between counties, in ordering a per centum of increase in the aggregate valuation of some of the counties, cannot be impeached in the absence of fraud, bad faith or usurpation of power. *Hacker v. Howe*..... 385

8. No notice is required, other than that given by statute, of the time and place of meeting or of action taken by the state board of equalization. *Hacker v. Howe*..... 385

9. The statute providing for the equalization of assessments of property is not invalid because no provision is made for an appeal to the courts. *Hacker v. Howe*..... 385

10. When an increase in values results incidentally in the equalization of assessments such increase is within the power to equalize. *Hacker v. Howe*..... 385

Taxation—*Continued.*

11. The state board of equalization cannot deal with individual assessments, but only with a county as a whole. *Hacker v. Howe*..... 385

12. Individual assessments must be corrected and equalized by county boards of equalization. *Hacker v. Howe*..... 385

13. That an individual taxpayer has returned for assessment money at its full value will not prevent the state board from raising the aggregate value of all property in the county. Provisions of this character are constitutional. *Hacker v. Howe*..... 385

14. Where the state board has increased the value of all property of the county, including money returned at its full value, such increase can affect only the one item. *Hacker v. Howe*..... 385

15. Whether a court of equity would grant relief from such overvaluation, not determined. *Hacker v. Howe*..... 385

16. In no event will an injunction against an illegal tax lie until taxes legally due are paid or tendered. *Hacker v. Howe*, 385

17. Under the first clause of sec. 1, art. IX of the constitution, property and franchises must be taxed according to valuation, and no discrimination can be made between foreign or domestic fire insurance companies. *Aachen & M. F. Ins. Co. v. City of Omaha*..... 518

18. A tax upon the gross amount of premiums received within municipalities by a foreign fire insurance company is not a tax upon property under the first clause of sec. 1, art. IX of the constitution, but is a tax upon insurance business, authorized by the second clause of said section. *Aachen & M. F. Ins. Co. v. City of Omaha*..... 518

19. Under the second clause of said section, a tax is uniform if persons subject to it are divided into classes and the law operates on the members of each class uniformly. *Aachen & M. F. Ins. Co. v. City of Omaha*..... 518

20. Sec. 6, art. IX of the constitution, provides that taxes for corporate purposes may be levied by municipal authorities, and by sec. 7 the legislature is forbidden to levy taxes for corporate uses of municipalities. *Held*, That which is forbidden to be done directly cannot be done indirectly. *Aachen & M. F. Ins. Co. v. City of Omaha*..... 518

21. Under secs. 1 or 6, art. IX of the constitution, foreign insurance companies may be treated as a class, and taxed at a rate different from that imposed upon domestic corporations. *Aachen & M. F. Ins. Co. v. City of Omaha*..... 518

Taxation—*Concluded.*

22. In the assessment of railway property for municipal purposes, such as is assessed by the state board of equalization for general revenue purposes under the provisions of secs. 39 and 40, ch. 77, art. I, Comp. St., 1901, the assessor of such city must accept the values of the state board. *State v. Back*..... 402

23. The proportional share of railway property as assessed by the state board of equalization, subject to taxation for municipal purposes, may be equalized by the proper authorities of such city. *State v. Back*..... 402

24. It is competent for the legislature to provide for the assessment of the property of a railway, required to be listed with the auditor of public accounts, by one assessing body, as an entirety, and to distribute the value on a mileage basis. *State v. Back*..... 402

25. Such plan of assessment does not violate the constitutional provision requiring uniformity of valuation and assessment. *State v. Back*..... 402

26. The assessment of the property of a railway as an entirety, and the distribution of the value on a mileage basis over the entire line does not change the situs of the property. *State v. Back*..... 402

27. The legislature may provide for assessing railway property the same as personalty, and fix its situs by its valuation as an entirety, and the distribution of the total value to districts on a mileage basis. *State v. Back*..... 402

28. The notice required under the revenue act, sec. 193 *et seq.*, art. I, ch. 77, Comp. St., 1903, for the sale of real estate for taxes, is not notice of a sale under the special provisions of ch. 76, laws of 1903. *City of Beatrice v. Wright*..... 689

29. Taxes and special assessments levied on real estate create no personal liability against the owner. *City of Beatrice v. Wright*..... 689

30. A release of the lien of taxes operates as a release for all purposes. *City of Beatrice v. Wright*..... 689

31. No notice is required of a sale of real estate for taxes delinquent for a period of over five years, under the provisions of ch. 76, laws of 1903. *City of Beatrice v. Wright*.... 689

Telegraphs and Telephones.

1. Permission to occupy streets by a telephone company, *held* proved by certain records of a city council. *Nebraska Telephone Co. v. City of Fremont*..... 25

Telegraphs and Telephones—*Concluded.*

2. Forfeiture of the franchises and easements of a telephone company in streets can be enforced only by a court of competent jurisdiction. *Nebraska Telephone Company v. City of Fremont*..... 25

Torts. See HUSBAND AND WIFE, 2.

Townships. See HIGHWAYS, 1.

Trial. See CRIMINAL LAW, 49-53, 56-60. DEPOSITIONS. INSURANCE, 8. NEGLIGENCE, 4, 6.

1. In an action against a street railway company to recover for causing death, *held* the court rightfully directed a verdict for defendant. *McLean v. Omaha & C. B. R. & B. Co*.. 447
2. On a motion to direct a verdict for defendant, plaintiff is entitled to every inference which may be drawn from the evidence. *McLean v. Omaha & C. B. R. & B. Co*..... 450
3. Where the plaintiff fails to establish facts necessary to a recovery, it is proper for the court to direct a verdict for the defendant. *Agnew v. Montgomery*..... 9
4. In an action for personal injuries, upon the evidence, *held* proper to direct a verdict for defendant. *Fielding v. Chicago, B. & Q. R. Co*..... 854
5. Although plaintiff in an action for personal injuries may show his wounds to the jury, it may be reversible error to permit a dramatic exhibition of them. *Felsch v. Babb*..... 736
6. *Held* not error to permit plaintiff, although crippled, to walk to the witness stand in the presence of the jury. *City of Minden v. Vedene*..... 657
7. Where the court has instructed on a material issue at the request of a litigant, it is not prejudicial to omit reference to such issue in instructions given on the court's own motion. *City of Minden v. Vedene*..... 657
8. In an action for personal injuries, an instruction allowing the jury to assess damages for permanent injuries, without evidence in support thereof, is erroneous. *Goken v. Dallugge* 23
9. It is error, in instructing a jury, to give undue prominence to a portion of the testimony. *Kleutsch v. Security Mutual Life Ins. Co*..... 75
10. Contributory negligence is a question for the jury when the evidence is conflicting. *McLean v. Omaha & C. B. R. & B. Co*..... 450
11. Refusal to enter judgment on a verdict not agreed to by all of the jury *held* proper. *Lincoln Traction Co. v. Heller*..... 127

Trusts. See EQUITY, 2.

One acquiring a trust estate with knowledge of its character, and while occupying confidential relations toward it, will be presumed to have taken the title subject to the trust. *Schwingel v. Anthes* 643

Usury. See BUILDING AND LOAN ASSOCIATIONS.

Vendor and Purchaser.

To an action by a vendor against a vendee in possession to enforce a lien for the purchase price, want of title in the vendor at the time of the sale or afterwards is no defense. *Young v. Figg* 271

Venue. See CRIMINAL LAW, 54.

Waiver. See INSURANCE, 2. PLEADING AND PRACTICE, 7. SALES.

Waters.

1. Under the irrigation act of 1895, an application for a permit to appropriate water for irrigation, which does not describe the location of the proposed canal nor contain a description of the land to be irrigated, is too indefinite to authorize the same. *Farmers Canal Co. v. Frank* 136
2. An adjudication by the state board of irrigation of a right of priority of appropriation of water, after proper notice, is final and cannot be collaterally attacked. *Farmers Canal Co. v. Frank* 136
3. Under the facts proved, *held*, that the right to appropriation of water was not lost by abandonment. *Farmers Canal Co. v. Frank* 136
4. Nonuser of a water right must be for a time equal to the statutory limitation upon actions to recover the possession of real property, in order to lose the right of appropriation. *Farmers Canal Co. v. Frank* 136
5. An owner may drain his land by artificial channels into a natural surface water drain on his own property, thence over the land of another. *Todd v. York County* 207
6. An owner may not discharge surface water in a volume and by means of an artificial channel upon another's land, contrary to the natural course of drainage. *Todd v. York County* 207

Witnesses. See CRIMINAL LAW, 56-60. EVIDENCE, 3, 4. HABEAS CORPUS, 7.

1. When a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted. *Ferguson v. State* 350
2. The test of whether a fact inquired of in cross-examination

Witnesses—*Concluded.*

is collateral is, would the cross-examining party be entitled to prove it as a part of his case. *Ferguson v. State*..... 350

3. Where an administrator introduces in evidence a letter the adverse party may testify to its contents under sec. 329 of the code. *Cline v. Dexter*..... 619